

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL BUREAU OF INVESTIGATION,)
ET AL.,)
 Petitioners,)
 v.) No. 20-828
YASSIR FAZAGA, ET AL.,)
 Respondents.)
- - - - -

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10
11 Washington, D.C.
12 Monday, November 8, 2021

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:00 a.m.

17
18 APPEARANCES:
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22 CATHERINE M.A. CARROLL, ESQUIRE, Washington, D.C.; on
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Today's orders of the Court have been duly entered and certified and filed with the clerk.

We will hear argument first this morning in Case 20-828, the Federal Bureau of Investigation versus Fazaga.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The state secrets privilege is firmly grounded in the Constitution and the common law and is critical to safeguarding the national security. The Ninth Circuit did not disagree with the district court's conclusion that the information concerning the foreign intelligence investigation at issue here was -- falls within that privilege.

The Ninth Circuit instead held that Section 1806(f) of FISA displaces the state secrets privilege and requires the district court to adjudicate the merits of plaintiffs'

1 challenge using the very information that is
2 covered by the privilege.

3 That novel interpretation cannot be
4 squared with the text, context, or purpose of
5 Section 1806(f). That section's purpose is to
6 provide a special mechanism for the suppression
7 of evidence when the government seeks to use it
8 against an aggrieved person in a judicial
9 proceeding or other proceeding.

10 The Ninth Circuit's first rationale
11 was that the government uses information against
12 a party when it invokes the state secrets
13 privilege. But the government invokes the
14 privilege to prevent the use of information, not
15 to facilitate its use.

16 Indeed, in this case, the government
17 argued, and the district court agreed, that
18 because the information concerning the reasons,
19 the subjects, the sources and methods of this
20 foreign intelligence investigation was so
21 central to the case that the case -- that the
22 First Amendment claim had to be dismissed.

23 The Ninth Circuit's other rationale
24 was equally erroneous. It ruled that
25 plaintiffs' prayer for relief seeking an

1 injunction requiring the FBI to destroy or
2 return the information comes with an 1806(f)
3 reference to a motion or request to discover or
4 obtain surveillance application orders and
5 related materials. But that clause governs
6 discovery in aid of a suppression motion. It
7 likewise does not displace the privilege.

8 At the very least, given the
9 constitutional and deep common law roots of the
10 state secrets privilege, Section 1806 cannot be
11 read to -- to reflect a congressional intent
12 that would be required to abrogate the
13 privilege.

14 JUSTICE THOMAS: Mr. Kneedler, do you
15 place -- a few times in your opening remarks you
16 referred to this as a common law privilege. Is
17 that your argument, that it's based in common
18 law rather than inheres in executive power?

19 MR. KNEEDLER: No, we -- we think it's
20 very strongly rooted in executive power. It --
21 it -- it's also firmly rooted in the common law,
22 and the -- the reflection of it being in the --
23 as part of the executive power goes all the way
24 back to the founding. Some -- many of those
25 early disputes were vis-a-vis Congress, not the

1 courts. But the basic point of the need for the
2 executive to protect information pertaining to
3 the nation's security as being part of the
4 presidential prerogative and the executive
5 branch necessity goes all the way back to the
6 founding.

7 But it's also recognized for very good
8 reasons, the same reasons, really, as a matter
9 of federal common law.

10 JUSTICE THOMAS: One final question.
11 The Respondent seems to make quite a bit of the
12 -- two cases, Totten and Reynolds, and argues
13 that these two have separate doctrines with
14 respect to executive powers or to state secrets.

15 Do you think they're two separate
16 doctrines, or is it just one doctrine?

17 MR. KNEEDLER: We think, at bottom,
18 that it's just one doctrine. The -- the
19 question of the privilege in the first instance
20 goes to the exclusion of the evidence --

21 JUSTICE THOMAS: Yeah.

22 MR. KNEEDLER: -- from the proceeding.
23 But then the next question is, what happens if
24 the evidence is excluded? And in that
25 situation, as we argued here, where the evidence

1 is so central, at least where the evidence is so
2 central to the case or its adjudication would
3 risk disclosing information at the core of the
4 case, the case should be dismissed.

5 And, in fact, this Court's decision in
6 Tenet versus Doe rejected the claim or the
7 contention that -- that the doctrine of Totten
8 was simply a contract doctrine. The Court said,
9 in fact, Totten was not so limited.

10 And the Court, quoting the -- the
11 famous passage from Totten, said public policy
12 forbids the maintenance of any suit in a court
13 of justice the trial of which would inevitably
14 lead to the disclosure of matters which the law
15 itself regards as confidential.

16 And in Reynolds itself, while the
17 Court was dealing with a privilege, it pointed
18 out that Totten was a particularly clear case,
19 and it was not necessary to -- even to get into
20 the question of evidence because the case
21 concerned the existence of a -- of a spy
22 agreement that was central to the case.

23 But I think the way the -- the Court
24 referred to Totten indicates that that was an
25 easy case that actually could be dismissed on

1 the face of the complaint because the face of
2 the complaint was alleging the existence that
3 was -- of a secret item that was -- that was
4 protected by the -- by the national security.

5 But, if you get further along, maybe
6 the face of the complaint doesn't say that, but,
7 as the government's declaration in this case
8 demonstrated, the adjudication of the case, if
9 it went forward, would concern the sources and
10 methods, et cetera, of the foreign intelligence
11 investigation that -- that -- such that
12 plaintiffs' First Amendment challenge could not
13 --

14 JUSTICE SOTOMAYOR: Mr. Kneedler --

15 MR. KNEEDLER: -- properly be
16 adjudicated.

17 JUSTICE THOMAS: Thank you.

18 JUSTICE SOTOMAYOR: -- part of -- I'm
19 sorry, Justice Thomas.

20 JUSTICE THOMAS: No, Im finished.

21 JUSTICE SOTOMAYOR: Did you finish?
22 Thank you.

23 I'm a little confused. I thought the
24 Ninth Circuit here basically only displaced the
25 state secrets privilege with respect to the

1 ability of the judge to determine whether, after
2 reviewing the information that was necessary,
3 that it thought necessary, that it then should
4 determine whether the seizure was lawful or
5 unlawful under 1806.

6 I thought that there were separate
7 writings basically saying that if, at that
8 point, it found the seizure unlawful, that then
9 it would consider disclosure only. I don't
10 think it said it would disclose if the seizure
11 was lawful. It said it would disclose only if
12 it's unlawful.

13 MR. KNEEDLER: But --

14 JUSTICE SOTOMAYOR: I don't know where
15 in any of our jurisprudence we've ever suggested
16 that an in camera review by a judge threatened
17 national security.

18 MR. KNEEDLER: -- our submission is
19 not that when the government invokes the state
20 secrets privilege that a court is altogether
21 barred from looking at the -- at a in camera
22 submission by the government to explain why the
23 information is privileged.

24 But the Ninth Circuit went beyond
25 that. It relied on 1806(f) to actually

1 adjudicate the merits. It said the court should
2 consider all of the constitutional challenges
3 that -- that the plaintiffs are bringing.

4 JUSTICE SOTOMAYOR: I'm sorry. 1806
5 only permits on its terms a disclosure if the
6 information is seized unlawfully. So I don't
7 know where you would get that the Court was
8 trying to do anything else but determine that.

9 And I think there were some of the
10 majority who wrote separately and said, if the
11 Court chooses to disclose, then -- but that's a
12 big if -- assuming that your seizure was
13 unlawful, then it has to be disclosed.

14 I guess my bottom line is you seem to
15 be rendering 1810 a nullity by basically saying,
16 if I invoke state -- if I don't invoke 1806 by
17 move -- me, the government -- by moving to
18 suppress evidence, then -- and I tell you it's a
19 state secret, even if I seize these materials
20 unlawfully, the Petitioners have no claim under
21 1810.

22 Is that what you're saying?

23 MR. KNEEDLER: Well, several things.

24 1810 does not apply to the government.
25 1810 is only a suit for damages.

1 JUSTICE SOTOMAYOR: Exactly. So if
2 these --

3 MR. KNEEDLER: So it cannot be the
4 basis for -- for a suit for an injunction.

5 JUSTICE SOTOMAYOR: Well, that's
6 assuming we read 1806 the way you do.

7 MR. KNEEDLER: No. No, I --

8 JUSTICE SOTOMAYOR: But 1810 --

9 MR. KNEEDLER: -- I was making a point
10 --

11 JUSTICE SOTOMAYOR: -- lets a --

12 MR. KNEEDLER: -- about 18 -- about 18
13 --

14 JUSTICE SOTOMAYOR: -- person --

15 MR. KNEEDLER: Yes.

16 JUSTICE SOTOMAYOR: --- 1810 lets a
17 person who's been surveilled unlawfully sue for
18 actual damages, liquidated damages, punitive
19 damages, and reasonable attorneys' fees.

20 So assume, as I must on the face of
21 the complaint, that the plaintiffs might be able
22 to prove without your information that they have
23 standing because they've been unlawfully
24 surveilled, and they're suing for a violation of
25 1810.

1 You're claiming that they don't --
2 they're not entitled to have the judge determine
3 whether they've been surveilled unlawfully or
4 not?

5 MR. KNEEDLER: There -- there are two
6 points about 8 -- about Section 1806(f). One is
7 that it is simply a suppression mechanism, not a
8 -- a -- a determination to --

9 JUSTICE SOTOMAYOR: Do we need to
10 reach that if we -- if we just say that 1806
11 doesn't displace state secrets? Why would we
12 even reach that question?

13 MR. KNEEDLER: Well, I -- state secret
14 -- because there's a threshold question.
15 1806(f) only applies -- it's triggered by the
16 government's intention or obvious purpose --

17 JUSTICE SOTOMAYOR: No, sir.

18 MR. KNEEDLER: -- to use the
19 information.

20 JUSTICE SOTOMAYOR: You -- you say
21 that the state secrets is not displaced by
22 1806(f). If we agree with that, why would we
23 reach that very knotty question, which, in your
24 brief, you asked us not to reach, of whether or
25 not a claim under 1810 would permit the judge to

1 look at the materials and say a seizure is
2 unlawful or not?

3 MR. KNEEDLER: What we've -- what
4 we've suggested is not before the Court is the
5 question of dismissal as a remedy or as a
6 consequence of invocation of the state secrets
7 privilege.

8 The other arguments we're making go to
9 the interpretation of 1806 itself in terms of
10 when can it be invoked. In our view, it can be
11 invoked only when the government affirmatively
12 will use the information against an aggrieved
13 party.

14 CHIEF JUSTICE ROBERTS: Mr. Kneedler
15 --

16 MR. KNEEDLER: And the invocation of
17 --

18 CHIEF JUSTICE ROBERTS: -- how is that
19 -- how is that consistent -- I mean, I think I
20 understand the argument you made in this respect
21 in your brief, but I'd like to hear it
22 concisely.

23 How is that consistent with the
24 language that any aggrieved person can use the
25 statute to discover or obtain applications or

1 orders or other materials relating to the
2 electronic surveillance? That sounds like the
3 other aggrieved person is using 1806(f).

4 MR. KNEEDLER: Yes, but in -- but we
5 submit in response, in the situation, just like
6 in an ordinary suppression situation, if the
7 government -- and -- and this is a statutory
8 codification of what is, at bottom, a regular
9 suppression motion or -- or procedure.

10 When the government intends to
11 introduce evidence obtained or derived from
12 foreign intelligence surveillance, then the
13 aggrieved party against whom the evidence would
14 be used has an opportunity, just as in a -- a
15 normal suppression motion, to challenge the
16 validity of the surveillance or -- or other way
17 in which the government obtained the evidence.

18 So it has to be triggered first by the
19 government's use of the information. And when
20 you -- when you read all the preceding sections
21 and (f) together, we think that's very clear.

22 Subsection (c) requires the government
23 to notify an aggrieved party when it intends to
24 use information against him in a proceeding.

25 (e) provides for a motion to suppress that. And

1 then (f) is about how a suppression procedure
2 would operate, whether -- whether it is the
3 result of the government's notification or a
4 motion under (e) or as a -- as a safeguard to
5 make sure this procedure is exclusive, any other
6 way in which an aggrieved party might seek to
7 challenge the government's use of the
8 information.

9 And your reference to the language in
10 -- in (f) refers to a motion or request is made
11 by an aggrieved party to discover or obtain
12 applications or orders or other materials
13 relating to the surveillance.

14 That is all information. It's classic
15 suppression. We want -- we want to see what
16 went -- what went into the warrant or what went
17 into the application to the FISC. So it's about
18 suppression --

19 JUSTICE KAGAN: But why isn't --

20 MR. KNEEDLER: -- not about a -- a
21 general discovery.

22 JUSTICE KAGAN: -- well, why isn't it
23 about both? I mean, a significant part of it is
24 obviously about suppression, but there are also
25 these references to discovery. And why -- why

1 shouldn't we understand this provision as doing
2 both things, as codifying a suppression
3 procedure and also codifying a discovery
4 procedure? Because it may be that plaintiffs in
5 a case like this one look to discover very
6 sensitive materials and Congress wanted a
7 procedure in place to deal with those kinds of
8 discovery requests.

9 MR. KNEEDLER: Well, in a -- in a
10 civil case, if there is a discovery request and
11 the -- and the information is covered by the
12 privilege, the mechanism for dealing with that
13 is the assertion of the state secrets privilege.

14 There is no automatic right in a civil
15 plaintiff to get discovery from the government
16 vis-à-vis a privilege. But -- but where the
17 government actually comes forward and says we
18 want to use this information against you, then
19 --

20 JUSTICE KAGAN: But you're just --
21 you're just excising words from this statute. I
22 mean, this -- this statute is about discovering,
23 obtaining, or suppressing evidence. That's --

24 MR KNEEDLER: Well --

25 JUSTICE KAGAN: -- that's the (f)

1 language, right?

2 MR. KNEEDLER: Yes, but the -- but --

3 JUSTICE KAGAN: Suppressing,
4 obtaining, or discovering, right?

5 MR. KNEEDLER: Yes, but --

6 JUSTICE KAGAN: I mean, it just seems
7 as though Congress wanted to do two things here.

8 It said we realize there are these
9 very sensitive materials, and maybe the
10 government will want to use them, and the person
11 will say: Oh, that's illegal, the government
12 can't use them. That's one set of
13 circumstances.

14 And the other set of circumstances is
15 maybe a plaintiff wants access to those
16 materials, and the government wants to say: No,
17 you can't have them. And that's another way in
18 which this statute says here are the procedures
19 you use when that occurs.

20 MR. KNEEDLER: I -- I think that that
21 phrasing has to be looked at in the context of
22 -- of all of the -- all of the subsections
23 dealing with the government's intent to use.

24 And, indeed, Section 1806 as a whole,
25 1806 is termed, is titled Use of Information.

1 Subsection (a) describes the uses to which the
2 government may put the evidence, that it can use
3 it only in connection with minimization
4 procedures.

5 Subsection (b) says that it -- that it
6 can't be turned over for law enforcement
7 purposes without a reservation by the attorney
8 general.

9 (c) through (g) deal with the
10 government's use of the information against a
11 party in a -- in a narrow situation in a legal
12 proceeding.

13 JUSTICE GORSUCH: Mr. Kneedler, I'm
14 curious, in the list you gave the Chief Justice
15 of the various sets -- subsections that you
16 think support your -- your position, you didn't
17 list (a), and -- which talks about preserving
18 privileges that otherwise exist, and I'm just
19 curious why the government didn't invoke (a).
20 There must be a reason.

21 MR. KNEEDLER: No, I think -- I think
22 (a) does cover that. I --

23 JUSTICE GORSUCH: Oh, so let's throw
24 that in now too. Okay. All right.

25 MR. KNEEDLER: Well --

1 JUSTICE GORSUCH: Okay. No.

2 MR. KNEEDLER: -- but -- but I think
3 it was --

4 JUSTICE GORSUCH: No, I just wondered
5 if you had a -- had thought about it, and if
6 not, that's fine.

7 MR. KNEEDLER: Yeah. No, I think it
8 also covers, like, attorney-client privilege --

9 JUSTICE GORSUCH: Okay.

10 MR. KNEEDLER: -- of the person being
11 surveilled.

12 JUSTICE GORSUCH: Okay. All right.
13 If you --

14 MR. KNEEDLER: But --

15 JUSTICE GORSUCH: I just wondered if
16 you'd had a thought about it.

17 MR. KNEEDLER: Yeah. No, I -- I --

18 JUSTICE GORSUCH: And if you didn't,
19 that's fine.

20 MR. KNEEDLER: -- I -- I think that's
21 a further confirmation of the --

22 JUSTICE GORSUCH: Okay, okay. I got
23 it. "Otherwise use," help me out with that.
24 The language is "enter into evidence, disclose,
25 or otherwise use." Why doesn't "otherwise use"

1 cover -- cover this circumstance?

2 MR. KNEEDLER: Well, I -- I think,
3 again, I'm not sure if you're looking at
4 subsection (c) --

5 JUSTICE GORSUCH: Yeah.

6 MR. KNEEDLER: -- or (e), but
7 subsection (c) says "whenever the government
8 intends to enter into evidence or otherwise use
9 or disclose." That --

10 JUSTICE GORSUCH: So -- so it has to
11 be a circumstance, it seems to me, where the
12 government isn't putting the evidence on and it
13 isn't disclosing it to the other side, but it's
14 making use of the evidence in some other
15 fashion.

16 And, here, I think there's a pretty
17 good argument on the other side that the
18 government is using it as a means to dismiss the
19 case without disclosing it. And -- and -- and
20 it is the existence of this secret evidence that
21 will neither be put in evidence nor disclosed
22 that is the basis for the dismissal under
23 Reynolds and Totten in the government's view.

24 So why doesn't that fit perfectly?

25 MR. KNEEDLER: I -- the -- the -- the

1 language "enter" -- "enter into evidence or
2 otherwise use or disclose" is intended, as we
3 understand it, to be a comprehensive description
4 of any way in which the evidence might be --

5 JUSTICE GORSUCH: But it isn't because
6 you've got "otherwise use." So it can't be that
7 "enter into evidence" and disclosure are
8 comprehensive.

9 MR. KNEEDLER: Well, you --

10 JUSTICE GORSUCH: By definition,
11 Congress says they aren't and that there's an
12 other -- there's another way to use this
13 evidence that doesn't involve its disclosure.

14 MR. KNEEDLER: Well, you -- "use"
15 could also -- I mean, "enter into evidence"
16 suggests a formal proceeding, either a judicial
17 proceeding or maybe a formal --

18 JUSTICE GORSUCH: I think we have --

19 MR. KNEEDLER: -- proceeding under the
20 --

21 JUSTICE GORSUCH: -- a pretty formal
22 proceeding here, Mr. Kneedler, don't you?

23 MR. KNEEDLER: Yeah. No, no, but my
24 -- my -- I think you were looking -- I
25 understood you to be looking for an explanation

1 for the word "use." And the explanation I'm
2 giving is that when -- when you don't have a
3 formal proceeding where you -- where you have
4 Rules of Evidence introducing something into
5 evidence, something received in evidence, but an
6 informal adjudication before an agency that does
7 not have that sort of system --

8 JUSTICE GORSUCH: But, Mr. Kneedler,
9 we're talking --

10 MR. KNEEDLER: -- you might use it
11 even if --

12 JUSTICE GORSUCH: -- Mr. Kneedler,
13 we're talking about "otherwise use" in court,
14 and -- and, clearly, because we've got
15 disclosure and -- and entry into evidence.
16 Those things happen in court.

17 Why couldn't it be, again, that
18 "otherwise use" might include when the
19 government cites the existence of secret
20 evidence it's not willing to disclose or put in
21 evidence as a basis for dismissal of the
22 lawsuit? That's using the evidence as an
23 offensive weapon?

24 MR. KNEEDLER: Well, it -- again, we
25 think, when the government invokes the state

1 secrets privilege, it is invoking it to keep it
2 out of the case. It's not -- what -- what --
3 what the language is, is "to use against the
4 person in the proceeding," but the -- but
5 assertion of the state secrets privilege
6 successfully --

7 JUSTICE BARRETT: Mr. Kneedler --

8 MR. KNEEDLER: -- keeps it out of the
9 proceeding. I'm sorry.

10 JUSTICE BARRETT: -- can I follow up
11 on Justice Gorsuch's question? I guess I had
12 understood -- and maybe I'm misunderstanding --
13 your position to be that in 1806(c), "intends to
14 enter into evidence or otherwise use or
15 disclose," that it's not simply in a trial, but
16 it's to otherwise use or disclose at any trial,
17 hearing, or other proceeding in or before any
18 court, department, officer, agency, regulatory
19 body, or other authority of the United States.

20 I had understood you to be saying,
21 well, in all of those situations, you might not
22 be introducing into evidence, but you might be
23 using the evidence, bringing it before a
24 regulatory body in some way that's not a
25 proceeding. Or am I misunderstanding --

1 MR. KNEEDLER: No, that's precise --

2 JUSTICE BARRETT: -- your argument?

3 MR. KNEEDLER: -- that's precisely our
4 explanation. One --

5 JUSTICE BARRETT: And I -- oh, go
6 ahead.

7 MR. KNEEDLER: I'm sorry.

8 JUSTICE BARRETT: Sorry. Go ahead.

9 MR. KNEEDLER: No, I was going to say
10 one other -- one other clue to this is the very
11 same phrase "intends to enter into" -- or "enter
12 into evidence or otherwise use or disclose" in
13 (c) is used in (e), which says "any person
14 against whom evidence obtained," et cetera,
15 "will be introduced or otherwise used or
16 disclosed, may file a motion to suppress."

17 So I think that links (c)'s language
18 about use to the motion to suppress, which is
19 the way in which, again, (e) uses the very same
20 language. And then (f) is about the procedures
21 for suppression. And (g) then says, if the
22 government -- if the district court determines
23 that the surveillance was not lawful, it shall,
24 in accordance with the requirements of law,
25 suppress the evidence which was unlawfully

1 obtained or otherwise grant the motion.

2 And "otherwise grant the motion" was
3 intended to leave open the question of whether
4 this Court's decision in Alderman would apply
5 under -- under FISA. So it --

6 JUSTICE BARRETT: Thank you.

7 MR. KNEEDLER: -- it all hangs
8 together. And this would be a surprising way in
9 which the government -- excuse me -- in which
10 court -- Congress would override, abrogate the
11 state secrets privilege in a sentence about
12 discovery in the middle of four -- five
13 subsections of this statute dealing pretty
14 clearly with the suppression of evidence.

15 And even when you look at 1806(f)
16 itself, it -- it -- it talks about discover or
17 obtain applications or orders or other materials
18 relating to the electronic surveillance. It's
19 not -- it's not talking about evidence about the
20 plaintiffs' claim generally. It's focused
21 specifically on the things dealing with the
22 electronic surveillance.

23 JUSTICE ALITO: It --

24 JUSTICE BARRETT: Mister --

25 JUSTICE ALITO: -- it seems to me, Mr.

1 Kneedler, you have at least one textual argument
2 regarding the language in subsection (f), and
3 that is whether the prayer for relief
4 constitutes a motion or request.

5 But putting that aside, do you have
6 any other arguments about the literal meaning of
7 the language in subsection (f) on which the
8 Respondents rely? And if you don't, what are
9 the structural features that you rely on?

10 I understand your argument to be based
11 mostly on structure and not on the literal
12 language of -- of subsection (f). So two parts
13 to that. Any other strictly textual arguments?
14 And, if not, which structural arguments are you
15 relying on or which anomalies would result if
16 their interpretation were adopted?

17 MR. KNEEDLER: Well, there are, I
18 think, very important textual arguments in the
19 pertinent phrase, which actually has two parts,
20 but it says "discover or obtain."

21 And "discover" could, again, tie into
22 formal court proceedings, where -- where you
23 might file a discovery motion, but -- but
24 outside of formal proceedings, if you want to
25 obtain -- excuse me -- obtain the evidence

1 effectively in the same way you would through
2 discovery, but what you were --

3 JUSTICE ALITO: But the point is,
4 literally, they want to obtain this information,
5 do they not?

6 MR. KNEEDLER: No, what -- what their
7 prayer for relief seeks is -- is actually
8 expungement of it, not -- not to receive it.

9 JUSTICE GORSUCH: I thought they made
10 very plain that they'd be very happy to get the
11 documents back, which I think would be to obtain
12 them.

13 MR. KNEEDLER: Right, but -- but if --

14 JUSTICE GORSUCH: No?

15 MR. KNEEDLER: Yes, but that doesn't,
16 I think, really tie in with -- with what they --
17 what their complaint was. But the more
18 fundamental point is 8 -- 1810 does not provide
19 for injunctive actions against the United
20 States. And the Privacy Act does not provide
21 for expungement.

22 But the structural point, we think, is
23 also very important. As I mentioned here, the
24 -- the entirety of 1806 is addressed to the
25 government's use of information derived from

1 foreign intelligence surveillance. That's the
2 title. (a) talks about use with minimization;
3 (b) talks about when it's going to be furnished
4 for law enforcement purposes. All of these
5 other provisions that -- that we're discussing
6 go to when the government tries to use it in the
7 proceedings.

8 JUSTICE ALITO: Okay. I've got that
9 point. This is -- they are taking some language
10 out of this and interpreting it to mean
11 something that is quite different from most of
12 what is addressed in 1806. I -- I've got that.

13 Any other structural features that you
14 rely on?

15 MR. KNEEDLER: Well, the -- the
16 language -- I don't know whether it's structural
17 or -- but the language in -- in (c) and --
18 excuse me -- (c) and (e) that I referred to,
19 which ties "otherwise use" to suppression, and
20 then (f) being an implementation of the -- of
21 the method for suppression.

22 And on -- on (g), which talks about
23 grant -- suppress the evidence or otherwise
24 grant the motion, it's the same motion to
25 exclude the evidence from the proceeding. The

1 court can either suppress it or, I think
2 Congress hoped, do something else besides --
3 besides turning over all the information to the
4 defendant as part of the suppression. That's --

5 CHIEF JUSTICE ROBERTS: Thank --

6 MR. KNEEDLER: -- but -- but (g) talks
7 about suppression of evidence, not -- not
8 obtaining it.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Kneedler.

11 MR. KNEEDLER: I'm sorry.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas, anything further?

14 JUSTICE THOMAS: Mr. Kneedler, you
15 were -- just one brief thing. You were in the
16 process when you were discussing subsection (c),
17 and the -- it's 1806(c), you -- the phrase
18 "against an aggrieved person," you were about to
19 tell us what you thought of that before you got
20 distracted.

21 MR. KNEEDLER: I think that's very
22 important because it -- it -- it -- it shows
23 that it -- it has to be triggered by something
24 that the government is doing before you even get
25 into this procedure, and -- and that's why the

1 word "suppress" is very important here.

2 If the government intends to use the
3 information against somebody, you can move to
4 suppress it, or, if it's in a more informal
5 proceeding, you move to have it excluded or
6 don't consider it or whatever its -- whatever
7 its equivalent is.

8 Now there may be some civil
9 proceedings where -- where the evidence, you
10 know, maybe there's an argument it shouldn't
11 even be suppressed, but -- but, again, it's all
12 -- in 1978, it was all directed toward
13 suppression where the government intends to use
14 information against the person in the
15 proceeding, whereas the state secrets privilege
16 keeps it out of the proceeding.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 JUSTICE BREYER: Well, assume you're
21 right that 180 -- that this particular statute
22 doesn't displace the state secret doctrine.
23 Still, there are many situations and different
24 kinds in which it might arise.

25 This is an unusual one. A plaintiff

1 sues government officials and says: You have
2 unlawfully been wiretapping or surveying,
3 whatever. Okay?

4 The government goes back and says:
5 Judge, we have a good reason for doing that
6 wiretapping, and we don't want to tell people
7 what it is.

8 Doesn't the judge -- shouldn't he
9 still look to see if they're right? I mean,
10 one, maybe they don't. Two, maybe it isn't that
11 important. Three, maybe how they got it,
12 legally or illegal, has something to do with
13 whether -- and, E, maybe there are different
14 ways in which you could disclose some but not
15 all.

16 I mean, wouldn't that be generally
17 true whether this applies or it doesn't apply?

18 MR. KNEEDLER: What you're describing,
19 I think, is the normal administration of the
20 state secrets privilege --

21 JUSTICE BREYER: Uh-huh.

22 MR KNEEDLER: -- if the government
23 invokes it, yes, we're saying the court can look
24 at it, but it can't use it as a vehicle to
25 decide the merits of the case.

1 JUSTICE BREYER: Why not? Well,
2 that's Justice Scalia's opinion. I mean, I
3 don't know.

4 MR. KNEEDLER: No, I --

5 JUSTICE BREYER: Here, we have a
6 motion to dismiss, and all we have is that. And
7 before we decide whether the case should have
8 been dismissed or not dismissed, doesn't the
9 district judge and perhaps the court of appeals
10 and, for all I know, maybe us, have to look at
11 this information?

12 MR. KNEEDLER: Yeah, we -- we are --
13 we are not -- we are not saying in the normal
14 state secrets case the court, if -- if
15 necessary --

16 JUSTICE BREYER: Could look at it.

17 MR. KNEEDLER: -- can't -- can't look
18 at the --

19 JUSTICE BREYER: Okay. Then why don't
20 we just say this, say this case needn't be
21 dismissed. What should happen -- and -- and it
22 doesn't displace -- this 1806, it doesn't
23 displace anything that's relevant here, but we
24 should send it back, and the Ninth Circuit was
25 wrong, and the district court and maybe the

1 circuit too should go and look at the
2 information if they deem that necessary in terms
3 of the relevance to the case and decide --

4 MR. KNEEDLER: But --

5 JUSTICE BREYER: -- its relevance, how
6 it was obtained, dah, dah, dah, dah, dah, dah,
7 dah.

8 MR. KNEEDLER: But --

9 JUSTICE BREYER: And then someone can
10 move, like the government --

11 MR. KNEEDLER: -- the district court
12 --

13 JUSTICE BREYER: -- hey, keep this
14 out, dismiss the case.

15 MR. KNEEDLER: -- the district court
16 -- the government -- the district court already
17 did that. The government moved to --

18 JUSTICE BREYER: And did the Ninth
19 Circuit?

20 MR. KNEEDLER: The Ninth Circuit did
21 not reach the dismissal question --

22 JUSTICE BREYER: No.

23 MR. KNEEDLER: -- because it concluded
24 --

25 JUSTICE BREYER: So maybe they should

1 go back and say: Well, given the nature of this
2 information and how it was obtained, we will
3 review whether the district court was right to
4 dismiss it. Maybe we send it back to the
5 district court. A lot of things.

6 But, I mean --

7 MR. KNEEDLER: No, we --

8 JUSTICE BREYER: -- my point is there
9 should be a way to look at the information for
10 the court and decide what to do, not whether
11 this particular statute applies or not. I don't
12 know.

13 MR. KNEEDLER: Yeah. Yeah, we don't
14 think this statute in this point in context --

15 JUSTICE BREYER: And that's the end of
16 the case. All we have to do is say that you're
17 out of it?

18 MR. KNEEDLER: No, that -- that -- I
19 mean, that's -- that's what we think the proper
20 disposition is.

21 JUSTICE BREYER: Okay.

22 MR. KNEEDLER: It should reject the
23 district court -- or the court -- court of
24 appeals' erroneous view of 1806(f) and that it
25 displaces the state secrets privilege and have

1 it go back to the Ninth Circuit to review the
2 district court's determination that the evidence
3 was covered by the privilege, which Respondent
4 did not challenge below, and then whether
5 dismissal is necessary because --

6 JUSTICE BREYER: Yeah, because those
7 are separate questions.

8 MR. KNEEDLER: -- the evidence is so
9 central to the -- to the case.

10 JUSTICE BREYER: No more questions.

11 CHIEF JUSTICE ROBERTS: Okay. Justice
12 Alito, anything further?

13 Justice Sotomayor?

14 JUSTICE SOTOMAYOR: Can you answer my
15 question directly? 1810 gives any person who's
16 been unlawfully surveilled the right to seek
17 damages, punitive and otherwise, and attorneys'
18 fees.

19 If I'm hearing you right, your
20 arguments, you say that if a party has standing
21 -- and very few have standing because very few
22 people know they've been surveilled in the way
23 these plaintiffs do.

24 I've had research done, and the only
25 plaintiffs that have standing that I found where

1 a court has found standing to bring an 1810
2 claim is the Fourth Circuit case.

3 So -- but I think what you're saying
4 to me is if those -- these plaintiffs, who
5 appear to have reasonable grounds to believe
6 they were surveilled, so they have standing,
7 that they can't proceed if you claim state
8 secrets.

9 They can't have a judge look at this
10 evidence to determine whether it was lawful or
11 unlawful because you say, if a judge says it's
12 unlawful, and I don't know how, because if a
13 judge says it's unlawful, how are you injured?
14 All they have to do after that is prove their
15 damages.

16 MR. KNEEDLER: First of all --

17 JUSTICE SOTOMAYOR: You have no
18 defense once they've proven --

19 MR. KNEEDLER: -- first of all, we
20 don't believe that they have established
21 aggrieved party status. Whether -- whether --
22 whether, to what extent, or against whom
23 electronic surveillance was used has not been
24 disclosed. And so --

25 JUSTICE SOTOMAYOR: My bottom line is

1 you're saying a person who's been unlawfully
2 surveilled, if I -- if the government claims
3 secret, doesn't have recovery under 1810?

4 MR. KNEEDLER: Unless it could be
5 proved in -- in some other way. Now, in -- in
6 --

7 JUSTICE SOTOMAYOR: They have proved
8 it some other way.

9 MR. KNEEDLER: Well, you -- you could
10 -- you could have -- you could have other
11 disclosures of -- of surveillance maybe in a
12 criminal prosecution or in some other way.
13 There was testimony by the -- the informant here
14 in a criminal proceeding that disclosed some
15 information that could have been the -- the
16 basis for an 1810 proceeding.

17 But our bottom line is 1810 says
18 nothing about the state secrets privilege. It
19 is --

20 JUSTICE SOTOMAYOR: But answer my
21 question. If they -- if -- you -- once you
22 claim state secret, you say there's no way to
23 look at the information to determine whether it
24 was unlawfully obtained?

25 MR. KNEEDLER: If the requisites for

1 dismissal are satisfied, which means the court
2 agreeing that the information is privileged and
3 that the case cannot proceed because the
4 information is so central, but there's nothing
5 in 1810 that suggests the displacement of the
6 state secrets privilege.

7 And, yes, if -- if -- if all those
8 requisites were shown, then, yes, the case would
9 not go forward.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: I'm going to follow up
12 on Justice Breyer's question, and I'm not sure I
13 understood the government's position.

14 Is the government's position now that
15 it would be wrong to dismiss on the pleadings
16 without any further inquiry into the nature of
17 the materials and how they affect the lawsuit?

18 MR. KNEEDLER: No. I mean, the
19 government invoked the state secrets privilege.
20 The government -- the district court found it
21 was privileged. The government argued that,
22 therefore, the First Amendment claim needs to be
23 dismissed because that claim is the invest --
24 this foreign intelligence surveillance
25 investigation was actually based solely on their

1 First Amendment rights.

2 And to defend against that, it would
3 be necessary to look at the sources, methods, et
4 cetera, of -- of that --

5 JUSTICE KAGAN: Yes. So --

6 MR. KNEEDLER: -- investigation.

7 JUSTICE KAGAN: -- I mean, I -- I -- I
8 think what Justice Breyer was suggesting is, in
9 a case like this, I mean, maybe dismissal would
10 be the only appropriate remedy for the problem,
11 but maybe not. It depends, and it depends on
12 some investigation of the materials and how they
13 figure in the case and what harms they present
14 and so forth.

15 And the Ninth Circuit seems to have
16 misunderstood that point. Maybe you contest
17 that point. But the Ninth Circuit seems to say
18 in a kind of old-fashioned Totten-like way, the
19 government says state secrets and we just have
20 to dismiss it in the ordinary case, putting
21 aside the statute.

22 And I thought we made clear in General
23 Dynamics that that's only true in a small
24 category of cases where the subject matter of
25 the lawsuit itself revealed a state secret but

1 that in cases like this, in cases like this,
2 where asked -- it's an evidentiary privilege.

3 And, first, we're going to decide what
4 kind of evidence should be excluded, and then
5 we're going to decide based on the -- the full
6 evidence of the case whether the suit can go
7 forward or not in all fairness to the parties.

8 And that's what it seems the Ninth
9 Circuit didn't understand, and maybe you
10 contest, but I'm not sure you do.

11 MR. KNEEDLER: Well, no, no, I -- I
12 think the Ninth Circuit did get confused, but I
13 -- I want to make the point that the district
14 court already did what you're describing.

15 The government invoked the state
16 secrets privilege. The district court held in
17 the Ninth -- Respondents, and the Ninth Circuit
18 did not disagree, that -- that all the
19 information about the investigation was
20 privileged.

21 The district court then proceeded to
22 say, can this court -- can this case properly go
23 forward without that information? And said no,
24 both because that -- that's the very central
25 fact of the case, what was the basis or reason

1 for the investigation, and that can't be
2 adjudicated without delving into that
3 information or, at the very least, it would risk
4 disclosure of that. Therefore, that First
5 Amendment claim should be dismissed.

6 We -- and that should have been
7 affirmed, in our view, by the Ninth Circuit.
8 But they didn't reach that question because they
9 -- they went through this other process of
10 saying 1806(f) displaces the state -- state
11 secrets privilege. Therefore, there's no basis
12 for dismissal under the state secrets privilege
13 at least -- at least as of now.

14 So we think it should go back, where
15 we think the Ninth Circuit should affirm the
16 district court's --

17 JUSTICE KAGAN: But it should --

18 MR. KNEEDLER: -- dismissal.

19 JUSTICE KAGAN: -- but your -- it
20 should have -- you think it should affirm, but
21 you're saying the Ninth Circuit should reach
22 that question --

23 MR. KNEEDLER: Yes. Yes.

24 JUSTICE KAGAN: -- and should decide
25 that question --

1 MR. KNEEDLER: Yes.

2 JUSTICE KAGAN: -- as to whether all
3 of those conclusions about whether the nature of
4 the evidence required dismissal was -- was
5 correct?

6 MR. KNEEDLER: Yes.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: I -- I'd like to
10 come at that same question from a different
11 angle. Here's where I'm stuck, Mr. Kneedler.
12 You know, Reynolds told us and General Dynamics
13 reaffirmed that the state secret privilege
14 allows the government to keep evidence away from
15 a party but that generally the party is free to
16 prove its case using other evidence.

17 And so the government's really at a
18 choice. Does it want to disclose the evidence
19 and defend itself, or does it want to let a
20 judgment, a tort judgment, go ahead against it
21 and -- and keep -- keep national security safe?

22 Okay. And FISA was enacted against
23 that backdrop. And -- and if I were pressed, I
24 would say FISA is perfectly consistent with that
25 understanding of state secrets.

1 The problem is that now the government
2 takes a very -- much stronger view of what state
3 secrets doctrine is and it imports a lot of the
4 Totten stuff into it and says anytime we have a
5 secret, we're -- we're entitled to use that
6 evidence in our possession without telling you
7 anything about it as a basis for dismissing the
8 suit more or less as a matter of routine.

9 And instead of being put to the choice
10 of accepting a tort judgment but keeping a
11 secret, it now gets both. It gets to reject the
12 tort judgment and keep the secret. And in a --
13 in a world in which the national security state
14 is growing larger every day, that's quite a
15 power.

16 And it seems like the Ninth Circuit
17 operated on this understanding of the state
18 secrets doctrine, which might be inconsistent
19 with FISA, I think probably is inconsistent with
20 FISA, and then we have to ask the question of
21 which displaces, but that question only arises
22 if we accept a mistaken view of the state
23 secrets doctrine.

24 And so I think your friends on the
25 other side have made this point and suggested

1 why don't we just address the state secrets
2 problem and say the Ninth Circuit misunderstood
3 state secrets doctrine and reverse or remand on
4 that basis, and then we don't have to get into
5 this question of a conflict, which only arises
6 on a mistaken understanding of state secrets
7 doctrine.

8 What say you to that?

9 MR. KNEEDLER: The Ninth Circuit did
10 not -- did not reach the -- the dismissal issue
11 in this case.

12 JUSTICE GORSUCH: I -- I -- I
13 understand that.

14 MR. KNEEDLER: But -- and -- and with
15 respect to their argument about 1806(f)
16 displacing, in their view, it displaces the
17 state secrets privilege with respect to the
18 exclusion of the evidence also, not just to the
19 -- not -- not just to the dismissal remedy.

20 We think that is -- that that is
21 clearly wrong and that it -- what they're
22 basically saying --

23 JUSTICE GORSUCH: Why wouldn't this be
24 an alternative basis for affirmance and -- and
25 for finding for the Respondent?

1 MR. KNEEDLER: Because it would change
2 the judgment. The Ninth Circuit's judgment
3 contemplated -- I mean, in two ways -- well, the
4 opinion contemplated that if -- it -- it
5 assumed, with, frankly, I think maybe no basis
6 to assume, but anyway, that -- that the -- that
7 the entire case would be wrapped up in terms of
8 whether there was electronic surveillance, which
9 --

10 JUSTICE GORSUCH: That's clearly --

11 MR. KNEEDLER: -- has not been the --

12 JUSTICE GORSUCH: -- wrong. So why
13 not just say that and send it back, and we don't
14 have to get into this question about whether
15 FISA displaces state secrets, which begs the
16 question of what state secrets is?

17 MR. KNEEDLER: No, I -- I -- I think
18 it's the other way around, with all respect,
19 Justice Gorsuch. This is a -- this is a case in
20 which the Ninth Circuit relied on a statutory
21 holding, which could have ramifications much
22 more -- much broader than this.

23 But -- but the point about the court
24 deciding it, it would require an alteration of
25 the judgment because the Ninth Circuit

1 contemplated that in proceedings on remand,
2 there could -- the state secrets privilege could
3 be invoked and maybe even the dismissal remedy
4 would be available in the district -- in the
5 court of appeals' view on -- on remand.

6 So that -- so it's not properly before
7 this Court without a -- without a
8 cross-petition.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: Yeah, I have
12 several questions, Mr. Kneedler.

13 First, I just want to make sure, with
14 respect to Justice Gorsuch, is it your view that
15 that issue's before us?

16 MR. KNEEDLER: I -- I don't think it
17 is before you. I mean, it has been advanced as
18 an alternative ground for affirmance, but I
19 think it would require an alteration of the
20 judgment. But, in any way -- in any event, it
21 does seem to us that the statutory question is
22 antecedent the way the court looked at it.

23 And if the court was wrong, then it
24 should reach the question of dismissal. And --
25 and I would think this Court would want the

1 Ninth Circuit's view of -- of looking at the
2 evidence is this a case where dismissal might be
3 appropriate before it entered into the question
4 of -- of how dismissal can -- how and when
5 dismissal can follow a successful --

6 JUSTICE KAVANAUGH: You've said this
7 --

8 MR. KNEEDLER: -- invocation of
9 privilege.

10 JUSTICE KAVANAUGH: -- but I just want
11 to nail it down. The district court looked at
12 the evidence, concluded that the state secrets
13 privilege applied and dismissed.

14 When we send it back to the Ninth
15 Circuit, they will be able to review that, I
16 think you said?

17 MR. KNEEDLER: Yes, that evidence is
18 in the record. It's available to -- to this
19 Court. It's quite -- there was a classified
20 declaration that was presented to the attorney
21 general, Attorney General Holder, when he
22 invoked or asserted the state secrets privilege.

23 JUSTICE KAVANAUGH: So your -- that
24 was your answer to Justice Breyer and Justice
25 Kagan, I think. So --

1 MR. KNEEDLER: Yes.

2 JUSTICE KAVANAUGH: Okay. And then
3 picking up on Justice Thomas's first question,
4 back to the statutory issue, he referred to the
5 constitutional status of the state secrets
6 privilege, and I think -- I would be curious how
7 that plays into our statutory interpretation.

8 I think you said at one point we
9 shouldn't expect Congress to do a drive-by
10 incursion on the state secrets privilege through
11 this kind of language. But how does the
12 constitutional -- potential constitutional
13 backdrop of the state secrets privilege play in?

14 MR. KNEEDLER: I think the -- I think
15 the Court should insist upon some sort of clear
16 statement or clear indication that Congress
17 intended to abrogate a privilege that is, in our
18 view, critical to the President's exercise of
19 his Article II powers. And -- and so there is,
20 I think, a strong presumption against reading a
21 phrase buried in a statute clearly otherwise
22 dealing with the suppression of evidence and --
23 and a statute that is protective of the
24 government's interests and protective of the
25 national security, to read it to abrogate a

1 privilege in a -- in a disposition of a case
2 that would undermine that.

3 JUSTICE KAVANAUGH: Because there
4 would be a major Article II issue if Congress
5 tried to do that, but we don't need to get into
6 that. Is that --

7 MR. KNEEDLER: That -- that's correct.
8 And the same thing would be true about a statute
9 that is said to be in derogation of the common
10 law. You --

11 JUSTICE KAVANAUGH: Right.

12 MR. KNEEDLER: -- you wouldn't
13 naturally read a statute to overcome that.

14 JUSTICE KAVANAUGH: Last question.
15 The search claims are still alive regardless of
16 what we're talking about here, right? We're
17 talking about the religious claims?

18 MR. KNEEDLER: The -- the district
19 court dismissed the Fourth Amendment claims. We
20 did not -- we did not seek that. So, on appeal,
21 it's the religion claims because that goes to
22 the reasons and the scope of the investigation.
23 That's the core of the state secrets privilege.

24 And the government decided that at
25 this point it was not going to assert the state

1 secrets privilege over the Fourth Amendment
2 claims. But down the road, it might if they
3 can't be disposed of on -- on another basis.

4 JUSTICE KAVANAUGH: So are they still
5 alive in the district court then, the search
6 claims?

7 MR. KNEEDLER: Well, not the way the
8 district court disposed of it, but the -- but
9 the Ninth Circuit said it was wrong for the
10 district court to do that. So, if this case
11 goes back, the Ninth Circuit presumably would --
12 would reach the same conclusion.

13 JUSTICE KAVANAUGH: Would the
14 government oppose the search claims continuing?

15 MR. KNEEDLER: No, I -- I think that
16 was our -- our position on appeal. I -- I --

17 JUSTICE KAVANAUGH: That's --

18 MR. KNEEDLER: -- standing here, I
19 can't think of a reason why, but I -- you know,
20 I --

21 JUSTICE KAVANAUGH: I'm not binding
22 you for all time --

23 MR. KNEEDLER: No, I -- I just --

24 JUSTICE KAVANAUGH: -- but at this
25 moment. Yeah.

1 MR. KNEEDLER: -- I would just want to
2 make sure.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Mr. Kneedler, do you
7 concede that 1806(f) could apply in a suit
8 brought against the government? Maybe under
9 1810, maybe under something else.

10 MR. KNEEDLER: No, 1810 could not be
11 brought against the government because of --

12 JUSTICE BARRETT: I'm sorry.

13 MR. KNEEDLER: Yeah. Only damages.
14 But, if the government intended to introduce or
15 use the evidence in that case against -- against
16 the civil plaintiff, it could be used, yes. But
17 -- but it's not a free-floating discovery
18 device.

19 JUSTICE BARRETT: No, I understand
20 it's not a free-floating discovery device. I'm
21 just -- I understand your position that it's,
22 you know, when the government wants to use or
23 introduce evidence, that it -- that it applies
24 then, but the government may seek to do that
25 even if -- even if it's not a criminal

1 prosecution, for example, that the government
2 has brought?

3 MR. KNEEDLER: Yes. If the government
4 -- if -- or if -- if a plaintiff brings a suit
5 against the government and the government
6 intends to use the information --

7 JUSTICE BARRETT: Right.

8 MR. KNEEDLER: -- then 1806(f) would
9 be available.

10 JUSTICE BARRETT: So you're not taking
11 the position that Judge Bumatay took in the
12 Ninth Circuit, where he seemed to view it more
13 as confined to that circumstance?

14 MR. KNEEDLER: Yeah. No, we think it
15 -- it -- it applies irrespective of who brought
16 the proceeding.

17 JUSTICE BARRETT: Okay.

18 MR. KNEEDLER: It's the use,
19 introduction into evidence, use, et cetera,
20 against the person. So the -- the -- the
21 against is what -- is what triggers it.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr.
24 Kneedler.

25 Ms. Carroll.

1 ORAL ARGUMENT OF CATHERINE M.A. CARROLL
2 ON BEHALF OF THE AGENT RESPONDENTS

3 MS. CARROLL: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 I'd like to make two points.

6 First, Section 1806(f) provides only a
7 narrow mechanism for deciding the admissibility
8 and discoverability of surveillance materials.
9 It does not speak at all to the fact that the
10 government's assertion of the state secrets
11 privilege deprives the individual defendants of
12 a valid defense, a defense that depends not on
13 the surveillance evidence that would be at issue
14 in a FISA proceeding but on the privileged
15 information about the targets, predicates, and
16 scope of the investigation.

17 Second, adjudicating the individual
18 defendants' liability in camera and ex parte
19 with no jury and no right to participate would
20 violate the Seventh Amendment and Due Process
21 Clause.

22 Even if the court of appeals'
23 interpretation were plausible, FISA does not
24 compel it, and this Court should reject a
25 reading that raises those grave concerns.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: If we accept the
3 government's argument, though, we don't have to
4 get to that, right?

5 MS. CARROLL: Accepting the
6 government's argument that -- that FISA does not
7 displace the privilege --

8 JUSTICE THOMAS: Yeah.

9 MS. CARROLL: -- I think that that
10 resolves the -- the question because that was
11 the holding of the Ninth Circuit. The Ninth
12 Circuit instructed the district court to decide
13 in camera and ex parte whether the defendants
14 violated the constitutional and statutory
15 provisions. That's the invocation --

16 JUSTICE THOMAS: No, I'm -- actually,
17 I'm -- I may have confused matters. I mean the
18 constitutional avoidance argument.

19 MS. CARROLL: Correct. These are
20 constitutional issues that would arise if the
21 court of appeals' interpretation of FISA were
22 accepted. And I think it's largely undisputed
23 that under the court of appeals' reading you
24 would have an in camera ex parte adjudication
25 not just of the lawfulness of the surveillance

1 under FISA but of the ultimate liability on the
2 First Amendment and equal protection claims.

3 And I think it's undisputed that that
4 would violate the individual defendants' jury
5 trial rights and due process rights.

6 Now Mr. Kneedler, I think, has made
7 some good points that we agree with about the
8 language of 1806(f) regarding what a use is and
9 what a -- what a covered motion or request is.

10 But I think there's a -- just a
11 broader point to make about that statute, and
12 that is that the FISA, both 1806(f) and,
13 frankly, an 1810 claim, are completely
14 orthogonal to what is at issue in the First
15 Amendment and equal protection claims and the
16 defenses that are necessary to those claims.

17 As has been discussed, the result of
18 an 1806(f) procedure is limited to suppression
19 or admission of the fruits of the surveillance,
20 so the recordings, and potentially disclosure to
21 the aggrieved party of the application,
22 materials, and court orders.

23 None of that enables revelation of or
24 certainly not disclosure to my clients or the
25 ability to adjudicate the merits and defenses of

1 the religious discrimination claims, which, as I
2 said, don't turn on the surveillance evidence.
3 They turn on who was or was not a target of
4 investigation, why were they under
5 investigation, what were the motivations and
6 predicates, and what was the degree of fit
7 between the methods used and legitimate
8 counterterrorism goals, what were my clients'
9 individual motivations.

10 Those are all classic jury questions.
11 They are questions that are completely subject
12 to the privilege, as Judge Carney found, and
13 they -- they cannot come out, even in a limited
14 FISA proceeding, even if we thought that 1806
15 was available. So I think that that's kind of a
16 broader reason why the statute as a whole can't
17 be read to displace the privilege.

18 The -- the privilege here, as Mr.
19 Kneedler indicated, was properly asserted, and
20 the -- the court of appeals did not dispute
21 that.

22 In -- in making that determination,
23 the district court -- and he says he paid
24 especially close attention to the classified
25 materials, which the district court described as

1 providing comprehensive and detailed
2 information, informing the court as to the
3 sensitive and privileged facts.

4 And Judge Carney concluded from that
5 classified material that it provided essential
6 evidence to showing "that the purported dragnet
7 investigations were not indiscriminate schemes
8 to target Muslims but were properly predicated
9 and focused." That is the information that the
10 individual defendants need to be able to defend
11 themselves.

12 And this Court recognized in *General*
13 *Dynamics*, as the lower courts have uniformly
14 recognized, that it would be manifestly unfair
15 to allow claims to go on in that situation where
16 the government's assertion of the privilege
17 prevents an individual capacity defendant from
18 putting forward a defense that depends on that
19 privileged information, which, again, even if
20 there were some reason -- reading of FISA that
21 would allow a limited proceeding in camera to
22 determine the lawfulness of the proceeding under
23 FISA, that has nothing to do with the privileged
24 information and is not a mechanism for bringing
25 it out or allowing my clients to rely on it.

1 Just a -- a couple of quick points on
2 the text of 1806(f). Justice Gorsuch, you asked
3 what could the phrase "otherwise use" mean if
4 we're not talking about entry into evidence.

5 And I agree with Mr. Kneedler that
6 that language certainly covers use of
7 information in a proceeding outside of a court.
8 But even in court, as Your Honor knows, there
9 are many ways to use information without
10 entering in -- into evidence. I think, in this
11 context, with surveillance information, the most
12 likely use would be to impeach a witness. But
13 there are other ways --

14 JUSTICE GORSUCH: Counsel, on that,
15 you'd agree, though, that there aren't many ways
16 to use evidence in court without either entering
17 it into evidence or disclosing it, impeachment
18 being a good example of disclosing it?

19 MS. CARROLL: Impeachment, I think, is
20 also a use because you're not --

21 JUSTICE GORSUCH: It involves
22 disclosure, right?

23 MS. CARROLL: And I think refresh --

24 JUSTICE GORSUCH: Can you think of
25 another example?

1 MS. CARROLL: -- refreshing a
2 witness's recollection, I think, is one.

3 JUSTICE GORSUCH: Can you think of
4 another example? Refreshing recollection,
5 that's a good one. That's a good one. Others?

6 MS. CARROLL: I think -- I think also,
7 in -- in a summary judgment proceeding, as the
8 language of Rule 56 indicates, that when you use
9 information in support of a summary judgment
10 motion, it is not officially being entered into
11 evidence. It has to be in a form that could be
12 admissible into evidence, but it is not --

13 JUSTICE GORSUCH: I guess my question,
14 though, for -- for -- for Mr. Kneedler and I
15 guess for you is, can you think of another use
16 in court that doesn't involve disclosure or
17 entry into evidence? Each of the examples
18 you've given me involves at least disclosure.

19 MS. CARROLL: I'm not actually sure
20 that you do disclose to the jury when you're
21 refreshing a witness's recollection. But, in
22 any event --

23 JUSTICE GORSUCH: No, but you're
24 disclosing it to the witness, right?

25 MS. CARROLL: You're disclosing it to

1 the witness, that -- that is true, and if it --
2 if it's something that would help them to
3 remember their recollection. But I think,
4 again, that that also brings in the fact that we
5 could be talking about proceedings that aren't
6 subject to the Rules of Evidence as well.

7 And I think, again, thinking back to
8 the broader question, even if the Court thought
9 it were plausible to read that language more
10 capaciously, a reading of Section 1806(f) that
11 would allow, as the court of appeals thought,
12 adjudication not just of whether the privilege
13 was properly asserted, not just of whether the
14 FISA surveillance was lawfully authorized and
15 conducted, but whether the individual defendants
16 are liable for damages on constitutional claims,
17 to have that adjudication conducted without a
18 jury in an ex parte procedure in which they have
19 no apparent right to participate would plainly
20 raise grave and I think undisputed
21 constitutional questions that -- that plainly
22 favor the government's equally and, we think,
23 more plausible interpretation of the statute.

24 So we think the Ninth Circuit was
25 clearly wrong to hold that the privilege was

1 displaced by FISA. It should, as Mr. Kneedler
2 has suggested, instead have affirmed on the
3 ground that Judge Carney relied on given that
4 the classified information indicated, as the
5 district court put it, the classified
6 information gives defendants a valid defense
7 that is no longer available because of the
8 assertion of the privilege.

9 JUSTICE SOTOMAYOR: Counsel, why is it
10 -- why is it that the government's reading helps
11 you? I thought the essence of your claim is
12 that an ex parte review hurts your client
13 because it doesn't give your clients an
14 opportunity to be a part of it, as the Seventh
15 Amendment, correct?

16 MS. CARROLL: That's correct.

17 JUSTICE SOTOMAYOR: So why does it
18 matter if the government is the one that's
19 moving to use the evidence? Why wouldn't your
20 agents be suffering the same deprivation?

21 MS. CARROLL: I think it -- I think it
22 would be, and I think that relates to the
23 broader point I was making that even if 1806(f)
24 is invoked, regardless of how you think it could
25 be invoked, it doesn't get to the real problem

1 in this case, which is the unavailability of the
2 privileged information.

3 To Your Honor's point, the
4 constitutional claims we've mentioned under the
5 Seventh Amendment and the Due Process Clause are
6 violations that would arise from the court of
7 appeals' -- may I finish my response?

8 CHIEF JUSTICE ROBERTS: Yes.

9 MS. CARROLL: From the court of
10 appeals's interpretation. And under the
11 avoidance canon, where this Court has before it
12 two plausible interpretations of the statute,
13 the avoidance canon calls for rejecting the
14 interpretation that would raise those grave
15 questions.

16 And we think the government's
17 interpretation as recently adopted as well by
18 the Fourth Circuit is certainly plausible, and
19 that the Ninth Circuit's interpretation is
20 certainly not more than plausible. And so the
21 avoidance canon would come into play there.

22 CHIEF JUSTICE ROBERTS: Thank you, Ms.
23 Carroll.

24 Justice Thomas?

25 JUSTICE THOMAS: No.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 Justice Gorsuch? Anything further?

4 JUSTICE GORSUCH: No.

5 CHIEF JUSTICE ROBERTS: No. Justice
6 Barrett? Justice Barrett?

7 JUSTICE BARRETT: No.

8 CHIEF JUSTICE ROBERTS: Okay. Thank
9 you, counsel.

10 Mr. Arulanantham.

11 ORAL ARGUMENT OF AHILAN T. ARULANANTHAM
12 ON BEHALF OF RESPONDENTS FAZAGA, ET AL.

13 MR. ARULANANTHAM: Thank you, Mr.
14 Chief Justice, and may it please the Court:

15 Defendants do not seek just to exclude
16 secret information from this case. If that were
17 true, there would have been no need for them to
18 file a motion to dismiss our religion claims.

19 Instead, what they seek is not just to
20 exclude information but also to dismiss it. And
21 to be clear, as we've said repeatedly below, we
22 will not seek discovery on the religion claims.
23 We're prepared to proceed just on our own
24 evidence. So this case is entirely about
25 dismissal based on their need to use secret

1 information to defend themselves.

2 Now, we recognize they have a
3 legitimate interest in defending themselves, but
4 neither Congress nor the common law permit
5 dismissal on that basis.

6 Congress struck a balance. FISA
7 permits them to defend the suit using
8 information that we will never see, but as
9 Justice Sotomayor had suggested earlier, it
10 requires the court to review the information, ex
11 parte and in camera, to determine in the
12 surveillance was lawful.

13 Section 1806, as Justice Gorsuch has
14 already mentioned, applies not just when they
15 seek to enter secret information into evidence,
16 but also when they otherwise use it. "Use" is
17 very broad. It means to put into service, and
18 "otherwise use" means, as Justice Gorsuch has
19 been saying, in a different manner. So there
20 has to be a way different from just using or
21 disclosing that's also covered by the statute.
22 Relying on information to win dismissal of a
23 lawsuit is obviously using that information.

24 The government is also wrong on the
25 common law. As General Dynamics explained, the

1 Reynolds privilege is a privilege. The
2 privileged information is excluded, but the case
3 goes on without it. And in a -- that's 150
4 years of case law on which Reynolds relies. In
5 both U.S. and England, they can't point to a
6 single case where plaintiffs could make their
7 case without the privileged information and yet
8 still the court ordered dismissal.

9 Like the widows in Reynolds itself, we
10 are entitled to that opportunity, whether under
11 FISA's rules or under the common law.

12 Lastly, I want to emphasize, again,
13 Your Honors, that the court of appeals did not
14 hold that we can ever see privileged evidence.
15 If the district court orders disclosure to us,
16 the government can reassert the privilege.

17 JUSTICE THOMAS: Counsel, can you give
18 me an example of a case where "used" was
19 employed the way you are suggesting?

20 MR. ARULANANTHAM: Yes, Your Honor.
21 In the firearms context, this Court has done it
22 even without the word "otherwise," actually. So
23 the Court has said, for example, in Bailey v.
24 The United States, that just referring to a gun
25 in the course of a criminal transaction is using

1 it.

2 I -- I think also that statute, again,
3 is only "use." We have "otherwise use." So I
4 think ours is even more -- more broad than the
5 one that -- that -- the examples that the
6 government uses or Judge Bumatay's.

7 And sticking on the same point, if I
8 may, Your Honor, it is conceivable, I suppose,
9 that there might be some other use you could
10 come up with, although I don't think I've heard
11 one yet that is not a -- a disclosure or enter
12 into evidence, but that's not really the
13 question, right?

14 The question is whether when you refer
15 to a document in your motion and say we win and
16 the other side loses their religion claims
17 because of those documents, is that also a use
18 of it? And it just seems perfectly clear that
19 that must be true.

20 JUSTICE THOMAS: But it seems
21 counterintuitive that you would say you use it
22 by excluding it.

23 MR. ARULANANTHAM: Yes, Your Honor.
24 And this goes to Justice Gorsuch's point also
25 about the relationship between the common law

1 and FISA. If they were only seeking to exclude
2 it, if they say we will keep it in our vault and
3 then let the chips fall where they may, I don't
4 think that would be a use.

5 But when they then go further and say
6 we don't just want the common law traditional
7 rule, we want to now dismiss the religion
8 claims, even though you can make your case with
9 your own evidence, that transforms it from just
10 keeping it excluded into an affirmative use.
11 They're using it to effectuate the dismissal of
12 the religion claim.

13 So at that point, it becomes a use.
14 And that's why I think it's also relevant that
15 the Ninth Circuit -- the decision below only --
16 they said they only are finding it displaced
17 with respect to the dismissal remedy.

18 And -- and that's, I think, important
19 because it's -- it's when they move to dismiss
20 that it becomes a use and isn't merely exclusion
21 of the information at issue.

22 CHIEF JUSTICE ROBERTS: Well, you just
23 said "the information at issue." And what
24 they're using, it seems to me, is the privilege.
25 They're not using the information. The whole

1 point of this statutory provision in 1806 is to
2 keep the information from being used. I think
3 it makes more sense to talk about using the
4 privilege as opposed to a counterintuitive
5 reading, at least, I guess this is their
6 argument, which -- which is that this is to --
7 this proceeding is to prevent, prevent the use
8 as opposed to using it.

9 Maybe a consequence of it is that the
10 privilege is established, and then that means
11 the information can't be used, but I don't see
12 how the -- not allowing the information to be
13 introduced is using the information.

14 MR. ARULANANTHAM: So I -- I don't
15 disagree with Your Honor there. I think if all
16 they were doing was trying to keep it out and
17 nothing else, that would not be a use.

18 And I think it's because they argue
19 that the state secrets privilege actually
20 authorizes dismissal, unlike every other
21 privilege, even when the plaintiffs can move
22 forward without the privileged information,
23 that's why it becomes a use.

24 But to go back to the beginning of
25 your question, Mr. Chief Justice, I think to say

1 that they're using the privilege and not using
2 the information is a little odd. I think they
3 are using the privilege, but the -- the motion
4 makes no sense without the references to the
5 secret information, without the, you know,
6 submission of actually two classified
7 declarations and a classified memorandum, so
8 they're using both.

9 And -- and I think that -- that is the
10 most natural meaning of the word "otherwise
11 use." It -- it -- it -- I really can't imagine
12 how their motion would make any sense if it
13 didn't refer to the information.

14 So -- and once they're referring to
15 it, again, not just to keep it out, but also to
16 win dismissal of the religion claims, that's
17 what makes it into a use.

18 JUSTICE GORSUCH: Could -- could they
19 win dismissal by invoking a privilege if there
20 were no evidence to support the invocation of
21 the privilege?

22 MR. ARULANANTHAM: Yeah, and we
23 struggled, Your Honor, we could not think of a
24 -- a context in which that would arise. It
25 seems like they have to, in order to win, say

1 it's not just the fact that we're excluding the
2 information, it's also now that the -- the
3 evidence even though it's out of the case is
4 actually not out of the case and it's doing some
5 kind of work to come and dismiss claims, even
6 though the plaintiffs say that they can make
7 their case without it.

8 CHIEF JUSTICE ROBERTS: But it would
9 be a perfectly natural argument to say we think,
10 because of the national security basis, this
11 information cannot be used. That's how you'd
12 say it before the judge. And then the judge is
13 supposed to say: Well, you're using it, so you
14 lose.

15 MR. ARULANANTHAM: Again, Your Honor,
16 I -- I really think if that's all they were
17 saying, if they were saying because of the
18 national security implications, this information
19 has to go out of the case, then they would have
20 filed a motion in limine. They wouldn't have
21 filed it just in response to the complaint.

22 They would have waited for us to file
23 either a discovery motion, which, again, we're
24 not going to file, or a motion for summary
25 judgment. And -- and then they'd file a motion

1 in limine. That would not be a use.

2 But, instead, what they've come --
3 what they've done is they've said: On the
4 pleadings and declarations, only because we put
5 them in the case because we were concerned about
6 this possibility, really, because normally we
7 could have waited and filed the declarations
8 later, just on the pleadings they've said the
9 whole -- the whole religion aspect of the case,
10 the first eight counts have to be gone.

11 That's not just a result of the
12 exclusion of the evidence. So this is very
13 different from a case like most state secrets
14 cases where the plaintiffs need the information
15 in order to receive it. This is a case where we
16 have all the evidence that we need on these
17 religion claims just based on our own evidence,
18 and yet they're still saying the religion claims
19 cannot go forward.

20 JUSTICE ALITO: Can you explain the
21 basis for the distinction that I understand you
22 to have just made? And perhaps I didn't
23 understand what you said, but what I thought you
24 said was that invoking the state secrets
25 privilege for the purpose of excluding evidence

1 is a use, but invoking the privilege for the
2 purpose of seeking dismissal is not a use.

3 MR. ARULANANTHAM: I must have
4 misspoken. I'm very sorry --

5 JUSTICE ALITO: Oh.

6 MR. ARULANANTHAM: -- Your Honor.
7 That's exactly backwards. So if they just
8 invoke it to exclude the information --

9 JUSTICE ALITO: I'm sorry. All right.
10 Backwards. I --

11 MR. ARULANANTHAM: -- that is not a
12 use.

13 JUSTICE ALITO: What is the basis for
14 drawing that distinction? It seems that you're
15 -- you're -- if invoking the privilege is using
16 the privilege, wouldn't it be -- wouldn't --
17 wouldn't you be using the privilege in both of
18 those situations? Why -- why in one and not in
19 the other?

20 MR. ARULANANTHAM: I -- I think it's
21 using the privilege but it's not using the
22 information.

23 JUSTICE ALITO: Why is it not using
24 the information?

25 MR. ARULANANTHAM: Well, I -- I just

1 think, in normal discovery, normal privileges,
2 all the privileges, if -- and the -- these are
3 arguments that we agree with, that they're in
4 their brief, if I'm in an attorney-client
5 situation and someone tries to get discovery and
6 we say, well, that information is privileged, we
7 want to keep it out of the case, you don't say
8 you're using the evidence.

9 But if I then say: Oh, because you
10 have done that, now the underlying claim on
11 which you sought discovery has to be dismissed,
12 even though you say you don't need the evidence
13 and you don't want it anymore, or, actually, I
14 mean, like, we never wanted it, but anyway, you
15 know, you -- you don't want it.

16 Now you're doing something more than
17 just keeping it out of the case, and that --
18 that -- that distinction is -- is critical.

19 JUSTICE BREYER: So -- so, look, I
20 read Professor Donohue's brief from Georgetown,
21 and so that's very much in my mind. I thought
22 it was a good brief, and I think she seems to
23 know what she's talking about, I think she does.

24 So I'm thinking, look, the thing is
25 that you don't want the case dismissed. Of

1 course. And Totten doesn't apply. And so they
2 shouldn't have had anything to do with that.
3 They should just look to Reynolds.

4 MR. ARULANANTHAM: That's right, Your
5 Honor.

6 JUSTICE BREYER: All right. Now give
7 -- that's what seems to be the issue and the
8 problem. So do you really care whether the
9 government's right or wrong on the displacement
10 of the state secrets doctrine by 1806 or
11 whatever? Suppose we said, no, it doesn't, but
12 it doesn't matter that it doesn't because, of
13 course, as quoting the government, the judges
14 will look at this information, and if the
15 information -- it doesn't solve the problem --
16 simply to say we don't want the information,
17 namely you, of course, you don't.

18 But the government says: Judge, look
19 at this. You will see that we both can't
20 introduce the information because it's just too
21 secret, it's unbelievable harm if we do, and it
22 proves beyond any doubt their case is wrong.

23 What is the Court supposed to do then?
24 And there I don't know. And we have Justice
25 Scalia's opinion on that. And where I am at the

1 moment is I don't know, but I don't have to
2 decide that yet.

3 And it might not be those situations
4 that are the dilemma I just described until not
5 only the district court under the proper
6 standard but also the court of appeals looks at
7 this and sees if there's some special reason to
8 dismiss the whole case or not.

9 No automatic dismissal. No automatic
10 no dismissal. I don't know.

11 All right. There you are. That's
12 where I am. Say anything you like.

13 MR. ARULANANTHAM: Thank you, Your
14 Honor. Three -- three thoughts I have about
15 that.

16 First, I just want to be clear on the
17 very first point you made, why do we even care
18 about FISA? We have two distinct paths, as we
19 see it, to success in -- in this Court.

20 The Court could hold that the state
21 secrets privilege does not authorize dismissals,
22 either at all, outside of contracting cases, or
23 where the very subject matter is not secret, or
24 the narrower ground, which I think Your Honor
25 had discussed with Mr. Kneedler, which is on the

1 pleadings before any of the information has been
2 looked at. And the district court looked at
3 declarations, not at the underlying information.

4 JUSTICE KAGAN: But Mr. Kneeder says
5 that that way of resolving the case would not
6 get to an affirmance. How would it get to an
7 affirmance?

8 MR. ARULANANTHAM: I -- I think it
9 gets to an affirmance because, at the very end
10 of the court of appeals decision, the court says
11 it's adopting -- this in the proceedings on
12 remand -- it says it's adopting the D.C.
13 Circuit's rule from *In re Sealed Case* that the
14 government -- it's essentially Judge -- then
15 Judge Scalia's view in *Molerio*, the valid
16 defense rule saying you can't dismiss that on
17 the pleadings.

18 You've got to look at the information
19 and see if the injustice that we're
20 contemplating here actually would happen. Is it
21 true that, actually, there was no bug in Mr.
22 Fazaga's office when he was giving very, you
23 know, intensive religious instruction to his
24 congregants, or maybe it was warranted, you
25 know, meaning there was a warrant for it.

1 And -- and then, if that's true, and
2 so this would be -- work a grave injustice on
3 the government, once we know that, if that's
4 actually true, then you dismiss the case.

5 That was what Judge -- then Judge
6 Scalia said in Molerio, the decision below
7 adopts that through its affirmance of In re
8 Sealed Case. And so that's why I think it would
9 be an affirmance.

10 This Court could just say: We hold it
11 was too early, send it back, and I suppose you
12 could say FISA displaces it or you -- you could
13 not -- or, excuse me, you could say FISA doesn't
14 displace it or you could say we don't have to
15 decide that, we vacate that, and just send back
16 the state secrets portion of the case, and that
17 would be an affirmance because it would lead you
18 to a very similar result, which is that, just as
19 Congress wanted, the Court is looking at the
20 evidence not just to decide if it should be
21 secret but if the government broke the law, if
22 the surveillance was actually unlawful.

23 You know, that -- that, I think, is
24 the critical reason why, because of that last
25 part, it is an affirmance.

1 Now that being said -- and I still
2 want to come back to the other parts of your
3 question, Justice Breyer -- we only have to win
4 that it's a basis for -- an alternative basis
5 for affirmance if it's not in the question
6 presented, right?

7 I mean, if it's in the question,
8 because you can't determine if FISA displaces
9 the state secrets privilege without knowing what
10 the state secrets privilege does, then it seems
11 to me that the Court can address it that way as
12 well.

13 We said in our brief in opposition, in
14 compliance with this Court's rule, 15.2, we said
15 we are going to argue that under General
16 Dynamics, there is no dismissal remedy available
17 in this case. We also argued that in the court
18 of appeals, a slightly different theory, but we
19 preserved the claim.

20 And then they replied in their reply
21 on the merits, and they cited a long set of
22 court of appeals cases that they said affirmed
23 their rule. And now they've come and said it's
24 not in the question presented. I think it is in
25 the question presented, and we also gave notice

1 of that, and they didn't say that it was not.

2 So I do think it's an alternative
3 basis by which the -- an alternative path to
4 victory. But just to go back then to, Justice
5 Breyer, the second part of your question, and
6 not to abandon in any way our arguments on FISA,
7 I want to stress another part of our
8 displacement argument which has actually not
9 been discussed thus far today.

10 1806(f) says, if the attorney general
11 files a declaration that disclosure or an
12 adversary hearing would harm national security,
13 then it shall apply these ex parte in camera
14 procedures that we have been talking about to
15 determine if the surveillance was lawfully
16 authorized and conducted.

17 Now that standard, the attorney
18 general files a declaration that disclosure
19 would harm national security, is almost
20 identical to the standard in Reynolds that
21 divulging the information could risk endangering
22 national security.

23 Substantively, the substantive rule is
24 almost identical. And the result of their view
25 is that the same attorney general declaration,

1 because this declaration satisfies 1806(f), it
2 says disclosure of this information would
3 reasonably endanger national security, an
4 attorney general declaration in our case, gives
5 the government two options.

6 They can move to dismiss under state
7 secrets privilege, which is what they've done,
8 or they can go through 1806(f) and give the
9 information ex parte and in camera to the court
10 even though the statute says these are the
11 procedures that shall be applied,
12 notwithstanding any other law, whenever these
13 conditions are met.

14 And so that is a powerful displacement
15 effect not for the state secrets privilege in
16 general but for the state secrets privilege as
17 applied to cases involving the domestic
18 electronic surveillance of Americans.

19 And that's all that's at issue in this
20 case, is just about giving the district court ex
21 parte in camera review, not -- not evidence, not
22 -- not disclosure to us, because the decision
23 below says they can reassert the privilege if
24 there's a disclosure to us.

25 But just that -- that aspect, the ex

1 parte in camera review for cases involving
2 domestic electronic surveillance, on that
3 aspect, 1806(f) occupies the field. It takes
4 away any other options, including outright
5 dismissal under what they say is the state
6 secrets privilege.

7 JUSTICE KAGAN: I -- I guess what
8 strikes me as wrong about that argument is that
9 if you look at 1806 and you just take a step
10 backward and you're not focusing on, like, what
11 does this word mean and what does that word
12 mean, but if you just take a step backward, what
13 1806 is all about is deciding whether
14 surveillance is legal.

15 And according to 1806, that matters
16 with respect to whether the government can use
17 it in the standard way that illegal evidence
18 can't be used in a proceeding, and, for whatever
19 reason, Congress thought it also mattered with
20 respect to discovery requests on the part of,
21 let's say, a plaintiff.

22 And -- and that's a very different
23 focus, you know, is -- was this -- was this
24 obtained illegally, because we think that that
25 question has something to do with whether we --

1 it should be discoverable or whether it should
2 be usable in court from the normal state secrets
3 inquiry, which is, you know, illegal, legal, who
4 cares? It's just dangerous for national
5 security.

6 MR. ARULANANTHAM: Yes, Your Honor. I
7 agree that both -- both parts of that. I -- I
8 certainly agree that the purpose of it is to
9 determine if it was lawfully authorized and
10 conducted.

11 And while I -- I do think that's
12 broader -- if you'll permit a slight
13 deviation -- I think it's broader than what the
14 individual defendants' counsel has suggested,
15 that it's only about Fourth Amendment. It
16 certainly incorporates First Amendment, and FISA
17 was very much about the First Amendment and, in
18 part, the persecution of religious minorities
19 actually.

20 So I -- I think that it's broader than
21 that. But I agree it's just about determining
22 whether the surveillance was lawful in whatever
23 context it may arise.

24 And I also agree, Your Honor, that
25 often, in the pre-FISA practice, the only

1 inquiry in the state secrets privilege analysis
2 was whether or not the information should be
3 secret.

4 But there were also cases where the
5 courts were not simply interested in whether or
6 not it was secret. They were also interested in
7 whether the Fourth Amendment was violated here.
8 We have cited a few of those in our brief,
9 Jabara v. Kelly. There's also a dissent in
10 Halkin v. Helms, from the rehearing en banc
11 where the judge makes this argument.

12 So I don't think it's implausible that
13 the -- Congress might have looked -- seeing a
14 backdrop of abuses identified in the Church
15 Committee, surveillance of Vietnam War
16 protestors and MLK and even a justice of this
17 court, I believe, they -- they would have said
18 we don't just want to know whether this is
19 secret. We also want to know did you break the
20 law.

21 And so I don't think it's that
22 implausible to believe that they used the same
23 substantive standard but said we want to bring
24 the courts in to decide if the government was
25 acting illegally.

1 JUSTICE ALITO: What is your answer to
2 Ms. Carroll's argument about the rights of -- of
3 her clients? Suppose that, in conducting this
4 ex parte in camera review, the judge says this
5 was illegal because it was based on religion.

6 Does that -- is that the end of the
7 case for her clients?

8 MR. ARULANANTHAM: I don't think it's
9 the end of the case.

10 JUSTICE ALITO: Well, then can they
11 have a trial?

12 MR. ARULANANTHAM: I mean, on that
13 question, I think, if the court finds that, then
14 you're not going to be able to give that same
15 question to the jury. We acknowledged that at
16 --

17 JUSTICE ALITO: Well, isn't that a
18 violation of -- of their due process rights?

19 MR. ARULANANTHAM: So we have
20 deliberately not said in our briefing whether we
21 think that's true or not. And it's --

22 JUSTICE ALITO: Well, that's why I'm
23 asking you now. How can that possibly be
24 consistent with -- with due process?

25 MR. ARULANANTHAM: Well, I think --

1 JUSTICE ALITO: I mean, that's --
2 that's the Star Chamber. I mean, a judge in
3 camera ex parte, without any -- not only without
4 the participants -- the presence of the
5 defendants, without the presence of their
6 attorneys, determines that they violated the --
7 the plaintiff's First Amendment rights.

8 MR. ARULANANTHAM: So I want to say,
9 after I answer your question, why I think it's
10 not a reason to construe the statute, so if
11 you'll -- but -- but to answer your question
12 directly, I think the -- the tricky issue for a
13 court, if they were actually considering this
14 constitutional question, you would have to first
15 consider what about the mirror image, because,
16 obviously, the same exact thing that you have
17 said is true of us.

18 And if it's true that they have
19 engaged in entirely lawful conduct, it sure
20 sounds bad for the reasons Your Honor has said,
21 but if they've engaged in unlawful conduct, and
22 you're going to dismiss the claim without us
23 having any opportunity to have a jury trial and
24 all the rest of it and due process as well, it
25 is -- and as -- we have not been able to

1 understand why it's any --

2 JUSTICE ALITO: Well, do you think
3 that every --

4 MR. ARULANANTHAM: -- different. It's
5 the exact mirror problem --

6 JUSTICE ALITO: Do you think everybody
7 who is aggrieved and would like to bring suit
8 has a due process right to bring that suit and
9 recover?

10 MR. ARULANANTHAM: No, but this is a
11 different situation. For both sides we're
12 hypothesizing -- and this gets to my reasons for
13 believing it's premature -- we're hypothesizing
14 we've beaten summary judgment, both sides,
15 right? Both sides have beaten summary judgment.
16 We've shown standing. There's no sovereign
17 immunity problem. All the other doctrines,
18 Iqbal, et cetera. And yet, still here we are.
19 And in that situation, I think it's the mirror
20 image problem.

21 The other thing I would say, Your --

22 JUSTICE ALITO: Well, it's not -- I
23 don't see how it could be a mirror image problem
24 because the due process rights of potential
25 plaintiffs are not the same as the due process

1 rights of -- of potential defendants.

2 But beyond that if this is the
3 conclusion -- if this is the result to which
4 your argument leads, isn't that powerful reason
5 for interpreting the statutory language
6 differently?

7 MR. ARULANANTHAM: Right. Thank you,
8 Your Honor. So I think it's not for two
9 reasons. You know, the -- the -- the main
10 reason is because, if you look at Section
11 1806(g), which is the provision which authorizes
12 relief in the case, once the district court has
13 determined that the surveillance either was or
14 was not lawfully authorized and conducted, it
15 says you suppress the evidence or otherwise
16 grant the motion in accordance with the
17 requirements of law.

18 And what read -- we read that to mean
19 that if we have an 1806(f) process, whether on
20 summary judgment or however it comes up, and
21 then the court finds the surveillance is
22 unlawful, they now have the right to say, at
23 that point, this would violate the Seventh
24 Amendment to bind us to that.

25 And, therefore, it would not be in

1 accordance with the requirements of law, and
2 then the issue can be litigated. And I should
3 say when I say the issue would be litigated, the
4 Bivens litigation hasn't happened. The 1810 --
5 our 1810 claim in this case, which no one has
6 moved to dismiss, although you heard Mr.
7 Kneedler say they might move to dismiss it,
8 right, that claim still remains to the
9 litigated.

10 And the defendants may well be out of
11 this case long before we get to this spot. Or
12 if there really wasn't a warrant and they were
13 spying on Mr. Abdelrahim while he was leading
14 his housemates in prayer, without a warrant,
15 then they might lose on summary judgment, and
16 then the case will be gone.

17 So I think it would be a mistake to
18 construe the statute very narrowly and, on their
19 view, basically destroy the ability to litigate
20 1810 claims because of this possibility which
21 is, you know, very, very unlikely to happen.

22 JUSTICE ALITO: What about this -- the
23 -- the "grant the motion in accordance with law"
24 language that you just mentioned, in -- "in
25 accordance with law" does that include in

1 accordance with the state secrets privilege?

2 MR. ARULANANTHAM: It actually does.
3 Your Honor, on the relief side, it does. And
4 that's consistent with the Ninth Circuit's
5 holding as to what would happen -- well,
6 actually, I'm sorry. The Ninth Circuit had, I
7 think, two reasons, you know -- let me step back
8 a second.

9 The Ninth Circuit said we think the
10 privilege is still available here and we haven't
11 required disclosure to the plaintiffs. And I
12 think that is consistent with FISA, both
13 1806(f), when we're going through the process of
14 deciding whether or not the information was
15 lawfully authorized or conducted and on the
16 relief side.

17 It's consistent on the (f) part
18 because the statute does not say that the
19 district court "shall" disclose to the
20 plaintiffs if needed to -- to determine the
21 lawfulness of surveillance. It says you, "may
22 disclose to the plaintiffs subject to security
23 procedures and protective orders only if needed
24 to determine the lawfulness of the
25 surveillance."

1 And what that means is that the
2 government has the ability to argue, in the
3 extremely unlikely event -- it has never
4 happened -- that -- it happened once and then it
5 got reversed on appeal. You know, the -- a
6 district court ordered a disclosure when
7 determining the legality of surveillance to the
8 plaintiffs, right?

9 In the extraordinary unlikely event
10 that that happens, the government will have the
11 ability to come in and say no, even with
12 protective orders, even with whatever else you
13 want to do with your SCIF or whatever it is,
14 there is no way to protect national security to
15 give this information to them. And that is, I
16 think, the -- the state secrets privilege.
17 That's the same argument.

18 JUSTICE BARRETT: And -- and to kind
19 of go back, like Justice Kagan was saying, the
20 state secrets privilege says, lawfully or
21 unlawfully obtained, we don't care because it
22 would harm national security. So you're
23 conceding that, even after you run through the
24 gamut of 1806(f) and conclude, listen, this was
25 unlawfully obtained, you're conceding that the

1 state secrets privilege could kick in and still
2 keep it out?

3 MR. ARULANANTHAM: At the relief
4 stage, so it -- it doesn't -- the main thing it
5 does is -- what -- what FISA does is it brings
6 the court into the picture where they can see
7 the evidence.

8 But -- but when the portions of it
9 that require disclosure to plaintiffs, that has
10 "may" in it. And so that's why it's a -- it's a
11 -- I -- I think it's perfectly consistent with
12 the state secrets privilege at common law, but I
13 just want to make sure clearly that I'm
14 understanding -- that I'm answering your
15 question. You're looking like I'm not answering
16 your question.

17 JUSTICE BARRETT: No, I'm just trying
18 to follow up on how actually it would play out.

19 MR. ARULANANTHAM: Yeah. Sure. So
20 you have to give the information to the court.
21 And that's what -- that's what Congress wanted.
22 The courts get to find out if the government is
23 breaking the law or not.

24 But if you ever want to disclose to
25 the plaintiffs to go beyond just the court and

1 now go to us and to the public, now the
2 government has the ability to argue that -- that
3 that's not permitted in the --

4 JUSTICE BARRETT: So you would be --

5 MR. ARULANANTHAM: -- interests of
6 national security.

7 JUSTICE BARRETT: -- deprived of your
8 opportunity to get relief?

9 MR. ARULANANTHAM: Yes. In our -- in
10 our -- yes. And in our --

11 JUSTICE BARRETT: So you would lose,
12 like you couldn't -- it was unlawfully obtained
13 but because it was protected by the states
14 secret privilege, you can't recover?

15 MR. ARULANANTHAM: No -- well, I mean,
16 I think that's possible in some cases. In our
17 particular case, we said that -- the prayer for
18 relief clearly says we want the evidence, the
19 unlawful -- the information on unlawfully
20 obtained to be destroyed or returned. That's
21 what we said.

22 So I think we have made a request to
23 obtain, absolutely, because we said "return."
24 That's one of the things we asked for. But we
25 said "destroyed or returned," and that means

1 that -- I mean, what we would argue in the
2 district court if we ever got to this spot, was
3 that, look, even if they say they can't show it
4 to everyone, they still need to destroy it.

5 And that would make a difference. I
6 mean, then our clients would at least still know
7 that the government, whatever records they got
8 from them because, you know, Mr. Fazaga was
9 leading his congregation in prayer or Mr. Malik
10 decided as a young man to embrace his faith,
11 they would at least know then that that got
12 burned because it wasn't right. It wasn't right
13 to spy on them because you thought that they
14 were dangerous just because they were embracing
15 their faith.

16 And so it wouldn't be everything, you
17 know, perhaps that we want, but it's well --
18 well within the scope of the complaint, and it
19 would also preserve the government's state
20 secrets privilege.

21 That being said, I feel all of this
22 we're so far ahead of it. Right? All the Court
23 would have to decide now in either of the two
24 paths is that FISA displaces the state secrets
25 privilege when the government is seeking to use

1 information, as it is here. And you wouldn't
2 even have to decide this question about request
3 to obtain. You could just decide they are using
4 it. They're otherwise using it. And because of
5 that, they can keep the information in their
6 vault, but they can't win dismissal of our
7 religion claims. We get our day in court on the
8 religion claims.

9 Or the Court could decide it was
10 premature to dismiss. I think as Justice Kagan
11 perhaps was suggesting, you could decide it's
12 premature to dismiss on state secrets at this
13 stage --

14 JUSTICE KAVANAUGH: Where does Article
15 II fit into your analysis? Because Judge
16 Bumatay and then Judge Diaz on the Fourth
17 Circuit both started with an Article II backdrop
18 and the roots of the state secrets privilege and
19 said, in interpreting 1806(f), we think this is
20 the better reading as a matter of text, but we
21 also think this would be a very odd way for
22 Congress to narrow, I guess, the state secrets
23 privilege, which is so foundational to the
24 national security of the country.

25 MR. ARULANANTHAM: So the bottom-line

1 answer -- and I have lots of thoughts on the
2 doctrine that they were discussing -- but the
3 bottom-line answer is, when we're not talking
4 about an area of exclusive and conclusive
5 executive power --

6 JUSTICE KAVANAUGH: Well, that's --
7 I'm going to stop you right there, sorry --
8 that's debatable --

9 MR. ARULANANTHAM: Well --

10 JUSTICE KAVANAUGH: -- right? And
11 that's the issue that hopefully we never have to
12 decide.

13 MR. ARULANANTHAM: So --

14 JUSTICE KAVANAUGH: But -- but I think
15 right now that's -- that's a question. And so
16 you avoid deciding that question, which has a
17 lot of ramifications, and I understand exactly
18 what you're saying on the Jackson framework
19 there, and we avoid deciding that by not
20 interpreting the statute to trigger that
21 question.

22 MR. ARULANANTHAM: So, if -- if we're
23 on the same page on the standard, right, then I
24 would say it's limited to the domestic
25 electronic surveillance of U.S. persons, and, I

1 mean, this Court in Keith invited Congress to
2 legislate in that area, right?

3 And also, equally important, Your
4 Honor, only ex parte in camera review, and that
5 second element is also important. If you look
6 at Nixon, for example, look at the last footnote
7 in Nixon. It's Footnote 21 on page 716. What
8 the Court says is we expect the district court
9 is now going to have to go through -- this is
10 high-level communications between the president
11 and his advisors -- and excise the information
12 that may be privileged under Reynolds.

13 JUSTICE KAVANAUGH: Nixon also, as you
14 know well, distinguished national security
15 information, so that would not be -- that would
16 be different, at least if it's presidential
17 communications, and I think that's --

18 MR. ARULANANTHAM: Right, but -- but,
19 respectfully, Your Honor, I'm -- I'm making a
20 narrow point here just about ex parte review.

21 JUSTICE KAVANAUGH: Yeah.

22 MR. ARULANANTHAM: That footnote cites
23 Reynolds. It doesn't just cite it. It says we
24 will have to -- the district court should -- and
25 it says you should cooperate with government

1 counsel to go through the information that may
2 need to be excised under Reynolds.

3 And so what I think that the Court was
4 imagining was the -- the president's
5 communication about national security with his
6 high-level advisors may not belong anywhere out
7 in the New York Times or anywhere else, but the
8 Court can look at it to determine if -- and --
9 and exclude it in the course of litigation,
10 which is important to determine if the president
11 broke the law.

12 And that's all FISA did here. That's
13 why I think the -- the -- the scope of the
14 displacement here is very narrow. It's just
15 limited to ex parte in camera review by courts.
16 And that's why I think there's not even a
17 serious Article II question here.

18 I mean, this is --

19 JUSTICE KAVANAUGH: One other
20 question. Sorry. I appreciate all that
21 explanation, which is helpful.

22 One other question, which is, are you
23 seeking to narrow Totten on your state secrets
24 argument, or are you taking it as written?

25 MR. ARULANANTHAM: We -- we take it

1 exactly as General Dynamics described it.

2 JUSTICE KAVANAUGH: Okay. Not as
3 written?

4 MR. ARULANANTHAM: And in our view,
5 also as Tenet described it, yes, Your Honor.

6 JUSTICE KAVANAUGH: Yeah.

7 MR. ARULANANTHAM: And I know you had
8 asked -- I can't remember, I think it was Mr.
9 Kneedler -- the -- about the passage in Totten
10 where they say: Look, judicial -- I can't
11 remember the exact language, but it's something
12 like review of -- of any matter that could give
13 rise to the divulging of secret information, you
14 know, that passage, and I would just point to
15 the fact this is the same passage that's picked
16 up in Tenet and that the government relies on to
17 say it's -- it's broad.

18 The very next paragraph there, the
19 Court says: As a -- I'm talking about Totten
20 now -- as a general matter, we can say that
21 suits about matters which are sort of inherently
22 secret cannot be maintained. And what they cite
23 is marital communication, attorney-client
24 communication, all of these things, regular
25 privilege law.

1 JUSTICE KAVANAUGH: Well --

2 MR. ARULANANTHAM: It's -- that part
3 of the case is actually not resting on a
4 national security rationale. It's just saying,
5 look, if I want to sue my wife over a promise
6 that she made in the kitchen or something, you
7 know, that's going to be -- that's going to be
8 barred. And the court can figure that out very
9 early. You don't need to wait for discovery to
10 figure out that, obviously, that suit is barred.

11 JUSTICE KAVANAUGH: To pick up Justice
12 Breyer's question earlier, though, it doesn't
13 seem like we need to get into that.

14 If we conclude -- if we agree with the
15 government -- I know you don't want us to -- but
16 if we agree with the government on the 1806(f)
17 issue and send it back to the Ninth Circuit, as
18 Justice Breyer and Justice Kagan described and I
19 mentioned earlier, all these kinds of issues can
20 be fleshed out and come back to us where that's
21 the central focus of the case.

22 I feel like we'd be doing a drive-by
23 in this case on a massively important issue if
24 we get into that.

25 MR. ARULANANTHAM: Yeah, I -- I agree,

1 Your Honor, that the narrowest ruling in our
2 favor probably in the whole case, yeah, I mean,
3 I think the "otherwise use" -- maybe I'm the
4 only one, or maybe not, I don't know, but I -- I
5 -- I think -- I think "otherwise use" is very
6 plausible as -- as a ground of statutory
7 interpretation for FISA.

8 You don't need to get into the
9 question, Justice Sotomayor, you had asked about
10 whether plaintiffs can use it in discovery if
11 you find the government is using it here, right?
12 But -- but the narrowest ground, perhaps even
13 narrower than that, would just be to say it was
14 wrong to dismiss on the pleadings in this case.

15 We know the very subject matter of
16 this case is not a state secret. The government
17 said this person worked for them. They said
18 they expect the majority of the audio and video
19 will be available for the litigation below. And
20 the district court still dismissed the whole
21 thing without ever looking to see whether --

22 JUSTICE KAVANAUGH: Well, the -- I'm
23 sorry to interrupt. The Ninth Circuit hasn't
24 really passed on that yet.

25 MR. ARULANANTHAM: They didn't. They

1 didn't.

2 JUSTICE KAVANAUGH: So why would we
3 pass on it before the Ninth Circuit did? That
4 would seem out of order to me.

5 MR. ARULANANTHAM: Well, yes, I -- I
6 -- it's true -- our argument that the dismissal
7 was premature, that was our primary argument. I
8 guess the issue is that I read their brief --
9 perhaps you can ask them -- but I -- I -- I read
10 their brief to be arguing for an affirmance, you
11 know, going underneath, an affirmance of the
12 district court order. And you cannot affirm the
13 district court order. But maybe that's wrong.
14 Maybe that's not what they're saying.

15 JUSTICE KAVANAUGH: Well, I -- I guess
16 I heard a little different from Mr. Kneedler,
17 but he can get back into that on rebuttal.

18 MR. ARULANANTHAM: Yes, but -- but --
19 but I think the Court could also say we disagree
20 on FISA, but we want you, court of appeals, to
21 address the prematurity argument, and state
22 secrets is nowhere here.

23 I think I would -- I would say, if --
24 if Your Honors find that the question presented
25 does not include state secrets at all, then that

1 would also mean you shouldn't touch the valid
2 defense issues that are in the -- that are in
3 the case as well.

4 JUSTICE GORSUCH: I'd like your help
5 with a related problem, and -- and that is, you
6 know, asking this question that we're struggling
7 with about 1806's consistency with state
8 secrets, it raises a question what state secrets
9 is.

10 And in 1978, when the Church Committee
11 issued -- after Church Committee issued its
12 report and Congress adopted FISA, Reynolds was
13 on the books, and that was pretty much it, and
14 Totten was over there having to do with spy --
15 contracts with spies.

16 And so -- so the state secrets
17 doctrine pretty clearly meant you exclude the
18 evidence and the case continues.

19 It's only since then in relatively
20 recent times that the government has asserted
21 the Totten bar really kicks in in a lot of cases
22 and that lower courts have run with that ball.

23 So asking what the state secrets means
24 today and whether that implicates FISA seems to
25 me a different question.

1 MR. ARULANANTHAM: Yes, I completely
2 agree, Your Honor. I would note that in their
3 long string cite footnote in their reply brief,
4 where they say here is all the court of appeals
5 cases, and leaving aside that most of those
6 cases are about where the plaintiff can't make
7 their case, but, even leaving that aside, the
8 string cite ends before 1978. You know, it ends
9 around 1980, I think.

10 I mean, there's -- there's -- even in
11 all of the cases that they have cited, they
12 don't prove that dismissal was a contemplated
13 remedy under state secrets outside the
14 government contracting context in 1978.

15 And I think it's quite clear that
16 actually, in 1978, if you -- there's lots of
17 state secrets cases. These are in Professor
18 Donohue's brief, among other places, and,
19 actually, several of them are in ours as well,
20 but -- but, you know, it's very clear that that
21 prior rule, the evidence was excluded and the
22 case goes on without it.

23 I mean, we cite cases from England
24 from the early 1800s, Wyatt v. Gore --

25 JUSTICE GORSUCH: I mean, I -- I -- I

1 -- I'm sorry to interrupt, but the -- but the --
2 but the -- but I do want to interrupt because I
3 think my real problem and what I'm hoping for an
4 answer for, we're -- we're -- we're in
5 tremendous agreement on this point, but -- but
6 what I'm struggling with is your -- the case
7 asked us, does -- does FISA displace state
8 secrets doctrine? And if this Court hasn't
9 definitively answered what the state secrets
10 doctrine is, that's hard, and if Congress had in
11 mind one version of the state secrets doctrine,
12 is that relevant -- the one that's relevant that
13 we should be asking about, you know, or do we
14 ask something -- other question?

15 MR. ARULANANTHAM: I mean, I --

16 JUSTICE GORSUCH: That's what I need
17 your help with.

18 MR. ARULANANTHAM: -- I see. I see.
19 I haven't thought, to be perfectly honest, about
20 whether the question presented is incorporating
21 today's understanding versus that one.

22 I think, when you're looking at what
23 -- what Congress contemplated -- I can answer
24 that part of the question for you -- Congress
25 obviously in 1978 is thinking about a state

1 secrets doctrine in 1978.

2 And so the fact that they are saying,
3 oh, look, FISA is not displaced and, yes, allow
4 us to dismiss claims, that -- that doesn't make
5 any sense because, if you're going to say, okay,
6 freeze the world and -- and operate as it
7 existed in 1978, then you can't be giving them a
8 dismissal remedy.

9 I don't know if that -- that
10 satisfactorily answers your question, but, yeah,
11 that -- that's my -- that's my view on that
12 subject.

13 I also think that if the Court thinks
14 that the state secrets question is not within
15 the question presented, if that's -- if that's
16 the Court's view, then -- but -- but the Court
17 also thinks that the district court can, you
18 know, proceed on the state secrets question, I'm
19 not sure there's a rationale for answering
20 either one, to be perfectly honest with you,
21 but, yeah, that's my -- that's my view on that.

22 JUSTICE ALITO: What happens in your
23 view in this situation? The plaintiff claims
24 that electronic surveillance was conducted for
25 discriminatory reasons, in violation of the --

1 the plaintiff's right to the free exercise of
2 religion, makes that a prima facie case. That's
3 not that hard to do in an employment case.

4 The evidence obtained through the
5 electronic surveillance shows without any doubt
6 that, in fact, the surveillance was not based on
7 the plaintiff's religion; it was based on the
8 fact that there was evidence that the plaintiff
9 is a terrorist.

10 What happens in that situation? And
11 the latter is covered by state secrets. And the
12 government says this can't be, it -- this is too
13 sensitive to be disclosed. What happens there?

14 MR. ARULANANTHAM: Yeah, I think
15 there's two options. Under the decision below,
16 which adopts the D.C. Circuit's view, which --
17 sort of based on the Molerio decision that we
18 discussed earlier, Judge -- then Judge Scalia's
19 view, the court can look at that information,
20 find the exact finding that you just made, and
21 then rule for the defendants. That -- that's
22 one view.

23 The common law view is different. The
24 common law view is that, look, privilege
25 sometimes hurts one side, sometimes hurts the

1 other side. It often leaves evidence out that
2 probably would have resulted in a victory, you
3 let the chips fall where they may.

4 And the -- and the decision below did
5 not adopt that rule. It adopted the rule from
6 the D.C. Circuit. I think those are the two
7 plausible options.

8 What is not acceptable in our view is
9 to say even if the evidence may show the
10 opposite, it may show it was blatant religious
11 discrimination, it said simply on Muslims,
12 that's what -- that's what -- that he was told,
13 the FBI told him to surveil simply on Muslims,
14 that nonetheless you would still win dismissal
15 because, hypothetically, they could have a full
16 and effective defense. That's the Fourth
17 Circuit view. It's the view that's pressed by
18 the other side. And that we would strongly
19 object to, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 1806(f), the provision we're talking
23 about, takes up the whole page of 207a and yet
24 it consists of two sentences. The sentence
25 we've been talking about is 20 lines, and

1 squirreled away in there are these few words
2 that you're relying on for displacement of the
3 state secrets privilege, for a reading of -- of
4 FISA that has enormous consequences for state
5 secrets, for national security.

6 And I just wonder, why would Congress
7 put such significant language stuck in this
8 provision? Isn't that an oblique way to have
9 the consequences you're ascribing to that
10 language?

11 The -- the -- the jargon in our
12 opinions, as you know, is this is, you know,
13 burying an elephant in a mouse hole, which is a
14 little overused, but what's the answer to that?

15 MR. ARULANANTHAM: Yes. So I favor
16 short declarative sentences, but, you know,
17 leaving that aside, I -- I -- I disagree with
18 their claim that FISA as a whole is hiding
19 anything in a mouse hole. You know, it's --
20 it's passed in the wake of extensive abuses that
21 were uncovered by the Church Committee. And
22 this provision, it says if the attorney general
23 -- you know, perhaps it should have been written
24 in a sentence or in its own section. You know,
25 I would have probably put it in three sections,

1 I think, if you think of its parts.

2 But -- but it clearly says that if the
3 attorney general finds that disclosure of the
4 information or an adversarial hearing would harm
5 national security, then you adopt the ex parte
6 in camera review process and determine if the
7 surveillance was lawful. So --

8 CHIEF JUSTICE ROBERTS: But -- but --

9 MR. ARULANANTHAM: -- I --

10 CHIEF JUSTICE ROBERTS: I'm sorry. Go
11 ahead.

12 MR. ARULANANTHAM: No, just I -- I --
13 I think this is a statute about domestic
14 electronic surveillance. The whole thing is --
15 I mean, it creates the foreign intelligence
16 surveillance court. It does all these things,
17 as Your Honor obviously knows. I just -- I just
18 don't see this as a mouse hole.

19 If it were trying to displace state
20 secrets privilege in other contexts not related
21 to electronic surveillance, I think there would
22 be a better argument that it doesn't make any
23 sense if they did this here. But the
24 displacement is only in the -- in the sense that
25 it creates all the procedures, the exclusive

1 procedures for how you litigate cases --

2 CHIEF JUSTICE ROBERTS: But I think --

3 MR. ARULANANTHAM: -- about
4 surveillance.

5 CHIEF JUSTICE ROBERTS: -- I -- I
6 think your argument really does hinge on the "or
7 other materials" language. Everything else is
8 consistent with Mr. Kneedler's point that this
9 governs when the government wants to introduce
10 evidence and not affording a vehicle for what
11 the court below did.

12 MR. ARULANANTHAM: No, Your Honor, I
13 -- I -- I would -- I would say there's two parts
14 that really contradict that view.

15 One is the plain language "any motion
16 and request under any other statute or rule,"
17 which they really have to add words into and say
18 any motion about admissibility or in response
19 to -- I mean, they -- they're having to cram
20 narrow -- narrowing construction onto this very
21 broad text.

22 The second point -- I think this is
23 something Justice Sotomayor said right early
24 on -- is, on their view -- and I think Mr.
25 Kneedler agreed with this -- they can just

1 dismiss 1810 claims. They can just win
2 dismissal of 1810 claims on the state secrets
3 privilege.

4 So Justice Alito had asked about
5 structural considerations earlier. I mean, the
6 structural argument in our favor is
7 extraordinarily strong. I mean, on their view,
8 every 1810 claim they can just pick and the ones
9 they want to dismiss on state secrets, they can
10 dismiss it using the same attorney general
11 declaration that is described in 1806(f).

12 So I think those are our two
13 arguments, strongest arguments, for why that
14 part, the request to obtain part of the case --
15 part of our argument goes for us. Obviously,
16 the use argument is different, right? If we win
17 on that, then we don't have to get into this.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 Justice Thomas?

20 Justice Breyer?

21 Justice Alito?

22 JUSTICE ALITO: Yeah, a technical
23 argument about the use provision. The use
24 provision requires the government to give notice
25 that it is going to use the information. And

1 that makes sense when the government wants to
2 introduce it -- it at trial, so it gives notice
3 that it's going to use it at trial, and that
4 allows the other party to move to suppress the
5 evidence.

6 But what sense does it make to require
7 prior notice when what the government is going
8 to do is to invoke the state secrets privilege?
9 You just invoke the state secrets privilege, but
10 you have to send a notice that says we intend to
11 invoke the state secrets privilege and now we
12 invoke the state secrets privilege? Does that
13 make any sense?

14 MR. ARULANANTHAM: I -- I think it
15 does. In -- in this case, it served a useful
16 function. They filed a notice of motion, and
17 then they filed -- filed the motion. And we
18 said -- as a preliminary matter before even
19 briefing it, we tried to make some of these
20 Totten versus Reynolds kinds of arguments to the
21 district court. And we said don't even look at
22 the information; first, decide as a threshold
23 matter whether or not the state secrets evidence
24 -- doctrine can apply here. And we said it may
25 be a necessary evil that you'll have to look at

1 the ex parte information, but if you can avoid
2 doing that, that would be better. We said it's
3 presumptively unconstitutional.

4 So it served a very important function
5 -- we lost, obviously, that argument. But --
6 but -- but I think it served a very important
7 function here, and -- and, yeah, I do think it's
8 -- it's important for that reason.

9 JUSTICE ALITO: One other question.
10 Under 1806, do you think that the judge must be
11 able to look at all of the evidence to the
12 extent it's necessary to decide whether the
13 surveillance was lawful?

14 MR. ARULANANTHAM: It's applications,
15 orders, and such other materials as are
16 necessary to determine. I don't -- I don't know
17 what the scope of "such other materials" is.
18 You know, the court of appeals predicted -- it
19 didn't decide -- it predicted that the scope of
20 evidence that would be reviewable to determine
21 whether the clearly electronic surveillance for
22 FISA purposes, like him leaving recording
23 devices in a prayer hall and walking away, to
24 decide if that was discriminatory on the basis
25 of religion would be the same information that

1 you would need to decide if, say, his consensual
2 conversations were also in violation of the Free
3 Exercise Clause.

4 But the court said, if that's wrong,
5 then that's fine. Then the district court can
6 say it's wrong --

7 JUSTICE ALITO: But --

8 MR. ARULANANTHAM: -- and then it can
9 separate -- it can -- it can apply normal --

10 JUSTICE ALITO: -- what I'm --

11 MR. ARULANANTHAM: -- or state secrets
12 privilege.

13 JUSTICE ALITO: -- what I'm interested
14 in is this. In cases involving the state
15 secrets privilege, isn't it true that the court
16 does not necessarily look at all of the -- of
17 the evidence? There are situations in which the
18 evidence is too sensitive.

19 Think the most secret -- think of the
20 most secret evidence that the -- the government
21 possesses. Yet, 1806 seems to say that the --
22 the court reviews ex parte in camera the
23 evidence -- the -- that evidence if it's -- if
24 it has a bearing on whether the surveillance was
25 lawfully conducted.

1 MR. ARULANANTHAM: Yes. So our
2 position would be that FISA brings the courts
3 into the process. And so, you know, the
4 government can always choose not to rely on some
5 piece of information. It doesn't even want to
6 give it to a court because it's worried the
7 court might leak the information. And they can
8 choose to do that.

9 But, if they -- if they want to use it
10 to show that the surveillance was lawful, they
11 have to give it to the court as long as it's
12 within that "such other materials relating to
13 surveillance."

14 But, you know, that's what I -- that's
15 what we think. I'm not sure the Court has to
16 address that question here. Obviously, it's,
17 again, quite premature. And I think the -- the
18 Court could hold that, you know, if this were
19 like nuclear weapons in Hawaii or one of these
20 other things -- I don't know how this would
21 happen in this case, it's 15 years old -- but --
22 but, you know, I think the Court could say we're
23 not deciding whether there might be, you know,
24 some set of information, maybe it's because that
25 part is in the constitutional core, if somehow

1 the president were involved in our case, which
2 seems quite implausible to me, but, you know --
3 and -- and say, well, you know, we're not
4 deciding that little part of it, but, in
5 general, FISA displaces the privilege and what
6 it says is that other such materials relating to
7 the surveillance have to be turned over to the
8 court, not to us, but to the court.

9 JUSTICE ALITO: Wouldn't that be quite
10 something? Because just dealing with some
11 super-secret information in district court -- in
12 district courthouses around the country would
13 create an incredible security problem. Most of
14 the -- most district courts don't have the
15 facilities to deal with information of that
16 sensitivity.

17 MR. ARULANANTHAM: Well, I -- we're
18 only talking about domestic electronic
19 surveillance of Americans. It doesn't arise --
20 the -- the claims don't arise if we're talking
21 about things like, for example, what you -- this
22 Court was dealing with, you know, last month in
23 a different state secrets case.

24 So we're only talking about that.
25 And, obviously, in criminal cases, Justice

1 Alito, already, courts all the time are doing
2 FISA ex parte in camera review where the
3 government is trying to use the information in
4 criminal cases. So I --

5 JUSTICE ALITO: Yeah, only if the
6 government chooses to -- wants to use the
7 information in a criminal case.

8 MR. ARULANANTHAM: Yes, that -- that's
9 true, Your Honor. I -- I -- our view is that
10 Congress thought, in this context, given the
11 history of abuse that had happened in this
12 particular area, it was important to interpose
13 the courts to play their role to ensure that
14 surveillance remained within the confines of the
15 law.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: Counsel, you
19 disclaim wanting to use this information. The
20 government hasn't made a motion to use it. It
21 made a motion to dismiss.

22 You concede that, whether or not that
23 motion to dismiss is appropriate under Reynolds
24 and General Dynamics and all that case law,
25 shouldn't be addressed by us, correct?

1 MR. ARULANANTHAM: No, Your Honor. I
2 -- I believe it's within the question presented,
3 and the Court has the authority -- and we did
4 argue it below. We said --

5 JUSTICE SOTOMAYOR: Yes, but --

6 MR. ARULANANTHAM: -- we put it in the
7 BIO. So --

8 JUSTICE SOTOMAYOR: -- but you agree
9 --

10 MR. ARULANANTHAM: -- our position
11 is --

12 JUSTICE SOTOMAYOR: -- that it hasn't
13 been properly briefed before us, and the Ninth
14 Circuit didn't look at that?

15 MR. ARULANANTHAM: No, the Ninth
16 Circuit didn't look at that because en banc 6-5
17 in the Jefferson decision, it -- it ruled that
18 Totten and Reynolds were on a continuum.

19 JUSTICE SOTOMAYOR: Right. But -- but
20 -- but --

21 MR. ARULANANTHAM: And this is before
22 General Dynamics.

23 JUSTICE SOTOMAYOR: Exactly. So --

24 MR. ARULANANTHAM: Right. So -- so it
25 --

1 JUSTICE SOTOMAYOR: -- that hasn't
2 been really addressed by them, not the way
3 you've argued it before us?

4 MR. ARULANANTHAM: No, Your Honor, it
5 was foreclosed --

6 JUSTICE SOTOMAYOR: All right. So --

7 MR. ARULANANTHAM: -- under circuit
8 precedent. So we didn't make this exact -- this
9 argument there.

10 JUSTICE SOTOMAYOR: So, if you were to
11 lose -- and I know you desperately don't want
12 to, but assume my assumption that all we hold is
13 that no one's invoked 1806 here, and we send it
14 back for the Court below to decide how state
15 secrets interacts with a motion to dismiss.

16 Is that the narrowest ruling that we
17 could issue?

18 MR. ARULANANTHAM: Yes, Your Honor. I
19 think holding that either, as I had discussed
20 with Justice Kavanaugh, either that you
21 shouldn't have dismissed on the pleadings or
22 that we want the Ninth Circuit to decide if you
23 should have dismissed on the pleadings, I would
24 just point, just note, I guess, that in the en
25 banc Ninth Circuit foreclosed our argument about

1 the scope of the Reynolds privilege here.

2 It was before General Dynamics, so
3 perhaps we could argue, hey, look, you know --

4 JUSTICE SOTOMAYOR: Exactly. So if we
5 tell them look at your holding in light of
6 General Dynamics --

7 MR. ARULANANTHAM: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: -- they should do
9 that anyway?

10 MR. ARULANANTHAM: Yes, Your Honor.
11 Yes, Your Honor. That would be the -- the
12 narrowest.

13 JUSTICE SOTOMAYOR: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: So this question
16 doesn't assume you lose. Suppose, you know,
17 just on this question of the relationship
18 between the two questions, suppose that the
19 easiest question in this case, I think, is the
20 question of when dismissal is appropriate, and
21 that the Ninth Circuit decision was in some
22 important way premised on an incorrect
23 understanding of when dismissal is appropriate
24 in a state secrets case.

25 And suppose, too, that I find the 1806

1 questions quite difficult. And if the entire
2 discussion of the Ninth Circuit was premised on
3 this error about state secrets dismissals, one
4 wouldn't have to get into that, that would seem
5 an attractive solution to me.

6 But that leaves an opinion on the
7 books, which may well be wrong, that the Ninth
8 Circuit's view of 1806, in fact, is incorrect.
9 So what should I do?

10 MR. ARULANANTHAM: I think the Court
11 could affirm on the alternative ground, but that
12 would still leave the Ninth Circuit opinion on
13 the books, I guess, is your point, Your Honor.

14 I guess -- I -- I suppose the Court
15 could say, under these circumstances, where, you
16 know, our first argument to the Ninth Circuit
17 was the dismissal was premature.

18 Perhaps the Court should say: We
19 think that the Court should have addressed that
20 question first and for that reason we vacate the
21 -- the decision and ask the Court to -- to
22 address that -- that question first.

23 I'm not sure -- I mean, under that
24 view, you wouldn't say whether it was right or
25 whether it was wrong. You were saying that

1 under these circumstances, given the
2 significance of the issues or, you know, for
3 whatever other reasons, we think it more
4 appropriate to address the question whether the
5 dismissal here was premature.

6 The district court did not look at the
7 actual underlying evidence. The district court
8 didn't explain why, when we said we would move
9 on our summary -- for summary judgment on the
10 religion claims, didn't say why that would still
11 somehow lead to inevitably the disclosure of
12 information, you know, unless -- unless they --
13 they carried the risk and it was -- it was them
14 that caused the risk.

15 So I suppose Your Honor could -- could
16 take that approach. I feel like your question
17 sort of did assume we would lose on FISA in the
18 end, but, you know, I mean, our -- our -- our
19 view is that the Court could also affirm on
20 either of those two grounds, but I guess Your
21 Honor already knew that, so.

22 Have I answered your question? I
23 sense -- yeah?

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch.

1 JUSTICE GORSUCH: I just want to make
2 sure I understand your answer to the question.
3 So it might be possible, I -- I think you're
4 saying, to vacate and remand the case, and say
5 it was premature for the Ninth Circuit to
6 determine that FISA displaced state secrets
7 without first asking what state secrets is and
8 how it applies to this case?

9 MR. ARULANANTHAM: Yes, Your Honor.
10 And we would say, as Justice Sotomayor had
11 suggested, particularly in light of General
12 Dynamics.

13 JUSTICE GORSUCH: Okay.

14 MR. ARULANANTHAM: And -- and there is
15 two -- if I -- if I -- if I may, Your Honor,
16 there is two aspects to that. One is whether
17 dismissal is available in light of General
18 Dynamics and the other is the prematurity part,
19 whether you can do it on the pleadings or you
20 have to let the case play out.

21 JUSTICE GORSUCH: Got it. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: One follow-up on
25 the Article II discussion we were having

1 earlier, I appreciate your answers on that, just
2 so I'm clear about what I'm suggesting.

3 I agree with you there would be real
4 doubts about whether the executive's power,
5 Article II power, to conduct domestic
6 surveillance would be exclusive and preclusive
7 under Category 3 of the Jackson framework, so I
8 agree that would be doubtful in my view,
9 although we haven't said that.

10 But, at a minimum, I think the
11 government is saying, in this separation of
12 powers back and forth between the executive and
13 Congress, what the executive is due is that
14 Congress speak clearly, directly, give some
15 clearer indication of an intent to intrude on
16 the state secrets privilege than we have here.

17 And the Chief Justice's questions
18 about a few words and Justice Alito's questions,
19 which I would certainly second, the district
20 court -- that this kind of information,
21 depending on what it is, is not the kind of
22 information you want floating around even in the
23 White House to people, much less floating around
24 the country, depending on what it is, of course.

25 So, on that question, that Article II

1 influences the reading is kind of what I'm
2 getting at with Article II, not the
3 exclusive/preclusive.

4 MR. ARULANANTHAM: Uh-huh. Yeah, I
5 think there are other statutes that have already
6 crossed this bridge. FOIA Exemption 1 and the
7 post EPA v. Mink congressional action on that is
8 one.

9 CIPA, even FISA, other provisions of
10 FISA which require very extremely sensitive
11 programs that the government is running to be
12 disclosed to this Court.

13 So, in that sense, I -- I don't think
14 there's a -- when -- when we're talking about
15 domestic electronic surveillance and only ex
16 parte review and all that, that's sort of the
17 answer I gave before.

18 JUSTICE KAVANAUGH: Yeah.

19 MR. ARULANANTHAM: The one other thing
20 I would say on it, Your Honor, is we're talking
21 here about rules for litigation, and all of this
22 is about when they file something in court and,
23 you know, all of that.

24 And it's very well recognized that
25 Congress has the power to set up a set of rules

1 for litigation, whether it be evidentiary rules
2 or other related procedures. Vance v. Terrazas,
3 you know, talks about this even in a context
4 where there may not be power over the original
5 -- I think, in there, it's the denaturalization
6 context. When you then talk about making the
7 evidentiary rules, Congress's power is even
8 heightened.

9 And so, here, we're not talking about
10 whether the government has the power in the
11 first place to do some thing. We're talking
12 about where they've already done it and now
13 we're setting remedies up.

14 1806(f) and 1810 are mechanisms, and
15 even if you believe them that it's about
16 government's use, the whole thing is about what
17 happens in court. And so I think there also
18 we're far afield from what I would think of as
19 potential core Article II concerns.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: I do have a
24 question. It's a follow-up to something Justice
25 Alito asked you earlier. He said to posit, you

1 know, you have religion claims in the suit, and
2 the suit is about whether the surveillance
3 violated or discriminated on the basis of
4 religion. But review of the application and the
5 related documents shows that there was no
6 religious discrimination. It was based on, you
7 know, very good evidence that the targets were
8 terrorists.

9 You said in that circumstance, like,
10 okay, well, then they've asserted the states
11 secrets privilege, let the chips fall where they
12 may, that dismissal's not a remedy under the
13 states secret privilege. Did I misunderstand
14 that?

15 MR. ARULANANTHAM: Yes, Your Honor. I
16 said there's two options. What you just
17 described is the traditional common law rule.
18 And it was the rule certainly in 1978.

19 JUSTICE BARRETT: You mean that it
20 proceeds forward just without the --

21 MR. ARULANANTHAM: Without the
22 privilege --

23 JUSTICE BARRETT: Okay, but my
24 question is then what happens to the individual
25 defendants? Let's say the evidence that they

1 can use to defend themselves against the claim
2 that they religiously discriminated is in this
3 body of evidence that's protected by the state
4 secrets doctrine. And you're saying dismissal's
5 not a remedy so they go in with their hands
6 behind their back and they just are sitting
7 ducks?

8 MR. ARULANANTHAM: Yeah. So two --
9 two thoughts, Your Honor, under common law that
10 is certainly the result, and there are --

11 JUSTICE BARRETT: Except under common
12 law, if you have a privilege like
13 attorney-client and then it's exclusively a
14 common law privilege, it can be pierced if it
15 would violate the due process rights, right?
16 But if -- if the state secrets privilege is not
17 entirely common law, if it has a constitutional
18 element, I'm not sure that the due process
19 rights of the defendants could pierce it.

20 MR. ARULANANTHAM: Yes, I'm -- I'm
21 just thinking of common law cases that are
22 actually cited in Professor Donohue's brief.
23 Republic of China is one. Northrop v. McDonnell
24 Douglas Douglas, where the defendant wants the
25 information and they say the chips fall where

1 they may. But -- so -- so --

2 JUSTICE BARRETT: Can that happen if
3 there's a constitutional element to the
4 privilege?

5 MR. ARULANANTHAM: So, I mean, if
6 we're talking about Article II, no, but you're
7 asking about a due process element?

8 JUSTICE BARRETT: Well, I'm asking
9 chips like fall where they may, and you're --
10 you're saying that that's fine even if it
11 violates the due process rights of the
12 individual defendants?

13 MR. ARULANANTHAM: Well, I think -- so
14 again, there's another option, and I want to
15 make sure I get to talk about other option --

16 JUSTICE BARRETT: Okay.

17 MR. ARULANANTHAM: Right? Which is
18 Justice Scalia's -- or then Judge Scalia's
19 option, but -- but, yes, I think it's often
20 going to be true -- I mean, if -- if the Due
21 Process Clause requires that someone needs the
22 evidence, then obviously that would trump the --
23 the common law. That -- that just seems --

24 JUSTICE BARRETT: So that assumes the
25 state secrets privilege is only common law?

1 MR. ARULANANTHAM: Yes, but if -- oh,
2 you're asking what if you have a conflict
3 between the Due Process Clause and the Article
4 II element of the state secrets privilege? I --
5 I don't -- I -- I don't know. I think, you
6 know, again, whatever the answer is, it would be
7 within the scope of the statute because it's in
8 accordance with the requirements of law. But --

9 JUSTICE BARRETT: It's just hard to
10 see letting the chips fall where they may if
11 it's then the individual defendants who are
12 deprived of access to information that they need
13 to defend themselves against the claim that they
14 discriminated on the basis of religion, when
15 let's imagine, in Justice Alito's hypothetical,
16 it's utterly clear from all the materials that
17 there was no religious discrimination.

18 MR. ARULANANTHAM: Yes, so, again, I
19 still want to talk about the other option.

20 JUSTICE BARRETT: Yeah.

21 MR. ARULANANTHAM: But the -- the last
22 thing I'll say before that is -- and this is
23 discussed to some extent in Tenet and cases like
24 that -- the government can always indemnify,
25 right? I mean, that -- when we're talking about

1 people who were working for the government,
2 which is typically what's going to happen in an
3 1810 case. You know, if you're talking about
4 the mirror image problem, do you let the harm of
5 the due process problem you're talking about or
6 the Seventh Amendment problem you're talking
7 about fall on this side of the ledger or our
8 side of the ledger? You know, we're out of luck
9 even if they blatantly broke the law, where they
10 have --

11 JUSTICE BARRETT: The due process --

12 MR. ARULANANTHAM: -- the possibility
13 --

14 JUSTICE BARRETT: -- rights, as
15 Justice Alito pointed out, are not the same for
16 defendants and plaintiffs.

17 MR. ARULANANTHAM: Yes. The Seventh
18 Amendment rights are the same. But let me get
19 to the --

20 JUSTICE BARRETT: Yeah. Please.

21 MR. ARULANANTHAM: -- let me get to
22 the other -- the other point. I mean, then
23 Judge Scalia, and actually even building on a
24 prior case, Ellsberg, said that the court is --
25 and this has become an In re Sealed Case, the

1 D.C. Circuit's rule and it is the rule adopted
2 by the decision below in this case -- is that in
3 that situation, the court can look at the
4 information, as Justice Alito had imagined,
5 decide that, yes, there is no basis for finding
6 that these people were discriminated against and
7 rule for the defendants.

8 And -- and that actually is what
9 happened in *Molerio*, where the person had a
10 claim that they thought -- a First Amendment
11 claim that they thought the court held would --
12 should survive summary judgment. But they said:
13 But we've seen the evidence and we know that
14 claim is wrong. And so they nonetheless ruled
15 for the defendant.

16 And I think that option would
17 certainly be available under the court of
18 appeals' decision in this case, so I think if
19 you -- if you affirmed, that option would still
20 be --

21 JUSTICE BARRETT: You're okay with
22 that option?

23 MR. ARULANANTHAM: -- available to
24 them. Yes, we haven't challenged it -- we
25 haven't challenged it here. And -- but, you

1 know, the -- the very last thing I would say
2 about that is our clients, they may have had
3 real targets, but the instructions that the
4 informant says he got and what he did was he
5 went all over the place and --

6 JUSTICE BARRETT: Well, I mean, I'm
7 not talking just about the facts of your case,
8 obviously, because how we interpret the statute
9 or what we might say or not say about the state
10 secrets privilege has ramifications beyond your
11 case.

12 MR. ARULANANTHAM: Understood, Your
13 Honor.

14 JUSTICE BARRETT: Thank you, counsel.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Rebuttal, Mr. Kneedler.

18 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

19 ON BEHALF OF THE PETITIONERS

20 MR. KNEEDLER: Thank you, Mr. Chief
21 Justice. Several points.

22 First of all, we think it makes sense
23 that the proper disposition of the case is to
24 review what the Ninth Circuit did decide, not
25 what it did not decide. The Ninth Circuit did

1 not decide whether the district court's
2 dismissal of the -- only the First Amendment
3 claim was proper on the basis of the state
4 secrets privilege because it said the state's
5 privilege -- state secrets privilege was
6 displaced by FISA.

7 And there's no doubt the privilege
8 existed clearly under Reynolds at the time that
9 FISA was enacted. So there is certainly no
10 reason to think that FISA displaced that
11 well-established privilege.

12 The question of what the consequence
13 of that privilege is not the privilege itself;
14 it's what happens if the privilege is validly
15 asserted and the evidence is removed from the
16 case. So I think, Justice Gorsuch, the question
17 is what Congress would have thought about the
18 state secrets privilege itself, not the
19 consequences of a successful assertion of it.

20 And as to whether 1806(f) displaces
21 the state secrets privilege, I think for a
22 number of reasons it clearly does not. For
23 example, it provides for the attorney general to
24 control things, not the head of the agency,
25 which is the -- who invokes the state secrets

1 privilege.

2 And, true, FISA was enacted to address
3 abuses of domestic surveillance, but other
4 provisions of FISA addressed that with the --
5 with the FISC and the applications for
6 approvals. But what -- what Congress did in
7 1806(f) and -- and the related procedures was to
8 codify in the statute a procedure that had been
9 developed at common law or by courts for the
10 suppression of evidence that was -- that was
11 obtained by electronic surveillance. And that
12 would arise only if the attorney general decided
13 to -- to put forward the evidence, as Justice
14 Alito described.

15 And there are many other things that
16 make that clear. Subsection (f) refers to two
17 motions -- types of motion, a motion to suppress
18 or a motion to obtain discovery of either the
19 application in order -- or the materials or the
20 evidence in order to suppress. And then
21 subsection (g), when it says that the court
22 grants that motion, it doesn't say grant
23 judgment. It says grant the order to suppress
24 or otherwise grant the motion, which means the
25 motion to exclude the evidence may be suppressed

1 or it may be something less than suppressed,
2 something more than suppressed. So it's all
3 wrapped up in the -- in the procedures for
4 suppression.

5 On the question of dismissal, we think
6 that -- that it is artificial to separate Totten
7 from Reynolds. Reynolds -- Reynolds itself had
8 a footnote about Totten after it discusses the
9 fact that national security information can be
10 excluded. It says: See Totten. And then it
11 describes Totten as a case where the -- the case
12 was -- was not permitted to go forward even at
13 the pleadings stage because it was obvious from
14 the face of the pleadings that the -- that the
15 case could not go forward because it concerned a
16 state -- a state secret.

17 But there are other situations in
18 which it is central to the case, a state secret,
19 such as here. They allege that plaintiffs --
20 that defendants violated their First Amendment
21 rights. But the evidence might well furnish a
22 basis for defending against that. That is
23 central to the case in the same way that the
24 contract in -- in Totten and in Tenet was
25 central to the case.

1 And General Dynamics, in fact,
2 contains a -- a number of passages that are
3 helpful, supportive of the idea that dismissal
4 can be an appropriate remedy. For example,
5 Respondents say that as plaintiffs they're happy
6 to make their case and then let the chips fall
7 where they may. Putting to one side the threat
8 of blackmail, gray mail against the government
9 in that sort of situation, forcing it to settle
10 or maybe even accept an injunction against us --
11 against it. But General Dynamics says it seems
12 to be unrealistic to separate, as the Court of
13 Federal Claims did, the claims from the defense
14 and to allow the former to proceed while the
15 latter is barred. Claims and defenses together,
16 it -- it's those that establish the
17 justification or lack of justification for
18 judicial relief.

19 The point is if the -- if the issue
20 cannot be fairly, soundly, safely adjudicated,
21 without risking disclosure of national security
22 information, then it can be -- can and should be
23 dismissed, whether this arises by the
24 government's assertion of the defense in
25 rebuttal, it's not even an affirmative defense,

1 it is a defense -- a factual defense, or whether
2 it -- it goes to the plaintiff's -- to the
3 plaintiff's case.

4 And, in fact, in General Dynamics --
5 no, I think it's in Tenet versus Doe, the Court
6 also relies on Weinberger where the case was
7 dismissed because the defense could not be
8 properly asserted due to state secrets
9 information.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Kneedler. Counsel.

12 The case is submitted.

13 (Whereupon, at 12:07 p.m., the case
14 was submitted.)

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